Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 78-53

WHIRLPOOL CORPORATION,

Petitioner,

vs.

LEWIS SIMPSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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No.

WHIRLPOOL CORPORATION,

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LEWIS SIMPSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner, Whirlpool Corporation, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on April 10, 1978.

OPINIONS BELOW.

The Opinion of the Court of Appeals is unreported and is reproduced herein as Appendix A. The decision of the district court is reported unofficially at 15 FEP Cases 887 and is reproduced herein as Appendix B.

JURISDICTION.

The Opinion and Judgment of the Court of Appeals was entered on April 10, 1978 (Appendix A). This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the Sixth Circuit, in reversing the judgment of the district court, erred in finding that commencing proceedings before a state agency was not required before bringing a suit in federal court under the Age Discrimination in Employment Act of 1967, where there is a state agency empowered to handle such proceedings.

STATUTORY PROVISIONS INVOLVED.

The statutory provisions involved are relevant portions of the Age Discrimination in Employment Act of 1967, 29 U. S. C. §§ 626(d) and 633(b) (hereinafter referred to as the "ADEA") and are reproduced in Appendix D. In particular, § 633(b) provides,

> "In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty (60) days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. . . ."

Other relevant statutory provisions involved are Title VII of the Civil Rights Act of 1964 as amended, 42 U. S. C. § 2000e-5(c), and the Kentucky Fair Employment Practices Act, Ky. Rev. Stat., § 344.010 *et seq.*, and are also reproduced in Appendix D.

STATEMENT OF THE CASE.

This case raises the important threshold question of whether prior commencement of proceedings with the appropriate state agency is required before the filing of a federal court suit under the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621 *et seq.* (ADEA).

Petitioner, Whirlpool Corporation ("Whirlpool"), employed Respondent Lewis Simpson for twenty-five years before Simpson tendered his letter of resignation and then commenced retirement in January of 1975. Simpson resigned after receiving his 1974 performance report which indicated an unsatisfactory work level that was not commensurate with his fourteen years of experience in supervision with Whirlpool.

Thereafter, Respondent retained counsel, who, on his behalf, notified the Employment Standards Administration of the United States Department of Labor that Simpson intended to bring an action against Whirlpool under the ADEA. On May 8, 1975, a conciliation conference between the parties was held, but voluntary settlement of the case did not result at that time. At the end of the conference, the Department of Labor advised Simpson that he should exhaust his remedies under Kentucky state law before proceeding further in federal court.[1]

Prompted by this advice, Simpson and his counsel met, later that very day, with the director of the Division of Labor Standards of the Kentucky Department of Labor. The director advised them that the Kentucky Equal Employment Act was administered by the State Human Rights Commission, and that

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1. The Kentucky Fair Employment Practices Act, Ky. Rev. Stat. § 344.010 *et seq.* (App. D) considers age discrimination an unlawful employment practice, and creates a state agency, the Kentucky Commission on Human Rights, to grant or seek relief from such practices.

proceedings would have to be instituted before that agency.[2] Simpson called the Kentucky Commission on Human Rights but did not file a written complaint as required. Accordingly, the agency could not process and, therefore, did not issue its standard written order of termination for any proceedings concerning Simpson.

Nevertheless, on June 23, 1975, Simpson filed the instant federal court suit. Whirlpool moved to dismiss the complaint on the basis of the Plaintiff's failure to file with the state agency. That motion was granted by Chief Judge Moynahan in a Memorandum Opinion filed December 29, 1975 (Appendix B). Quoting *Goger* v. *H. K. Porter*, 492 F. 2d 13 (3d Cir. 1974), the court agreed that " 'the Congressional intent that state agencies be given the initial opportunity to act *should be strictly followed.*' 492 F. 2d at 17" 15 FEP Cases at 888; App. B at A4 [Emphasis in district court order]. Simpson's "non-compliance with the clear statutory mandate" was "a fatal jurisdictional defect." 15 FEP Cases at 888; App. B. at A4.

Upon leave granted by the court, Simpson subsequently deposed the Director of the Kentucky Commission on Human Rights who confirmed that the Plaintiff had not commenced any proceedings before that agency. On that basis, Chief Judge Moynahan dismissed the action.

On appeal, the Court of Appeals for the Sixth Circuit, on April 10, 1978, reversed the decision of the district court and held that resort to the state agency was not required by the ADEA. The court's brief opinion was based solely upon its decision three days earlier in *Gabriele* v. *Chrysler Corp.*, 573 F. 2d 949 (6th Cir. 1978) (App. C) which held that prior commencement of proceedings with the appropriate state agency

2. Proceedings before the Kentucky Commission on Human Rights are commenced with the filing of a written sworn complaint with the agency. The Commission has, since 1966, accepted written complaints and attempted conciliation with respect to complaints of employment discrimination on the basis of age. The agency encourages individuals who contact it to commence proceedings by filing a complaint.

was not required before the filing of a federal court suit under the ADEA.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI.

I. The Sixth Circuit's Decision Is in Conflict with the Prior Decisions of Four Other Courts of Appeals.

The Sixth Circuit, in *Gabriele*, discussed but then rejected the holding of the first and leading case on the state deferral requirement, *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13 (3d Cir. 1974). In *Goger*, the Third Circuit agreed with the district court that initial recourse to a state agency to provide an opportunity for conciliation was required by § 633(b) of the ADEA.

> "We agree with the district court, however, that although the Act does not require an aggrieved person to exhaust state remedies as a condition precedent to the institution of a federal suit, it does require that the State be given a threshold period of sixty days in which it may attempt to resolve the controversy, normally by voluntary compliance." 492 F. 2d at 15.

In rejecting the Third Circuit's *Goger* opinion, the Sixth Circuit did not even cite the identical conclusion reached by the Ninth Circuit in *Curry* v. *Continental Airlines*, 513 F. 2d 691 (9th Cir. 1975). There, that court held:

> "[W]e concur in the reasoning of those courts that have held decisions interpreting 42 U.S.C. § 2000e-5(b) [as amended 42 U.S.C. § 2000e-5(c)] . . . to be generally applicable for purposes of interpreting § 633(b). [Citation omitted.] 'The minor differences between § 633 and its counterpart under the 1964 Act are insignificant and provide no support for an interpretation of the former which is contrary to' interpretations of the latter. *Goger, supra*, at 16." 513 F. 2d at 693. [Footnote omitted.]

Furthermore, and probably unknown to the Sixth Circuit when it issued the *Gabriele* decision on April 7, 1978, the

Eighth and Ninth Circuit Courts of Appeals had each issued an opinion earlier that week which agreed with *Goger* and *Curry* and were directly opposite the Sixth Circuit's *Gabriele* position. Specifically, on April 4, 1978, in *Reich* v. *Dow Badische Co.*, No. 76-7637, ... F. 2d ....., 17 FEP Cases 363 (2d Cir. April 4, 1978), the Second Circuit held that the deferral requirement to the state agency was mandatory under the ADEA and, therefore, affirmed the district court's dismissal of the complaint. The very next day, in *Evans* v. *Oscar Mayer & Co.*, No. 77-1692, ... F. 2d ....., 17 FEP Cases 221 (8th Cir. April 5, 1978), the Eighth Circuit held that the congressional intent that discrimination on the basis of age be remedied as quickly and effectively as possible would be best served by giving the Secretary of Labor and the state agency an initial attempt at conciliation before the commencement of a protracted federal court proceeding.

Yet, faced with two circuit courts of appeals decisions mandating state deferral and, most likely unaware of the yet two more circuit decisions which analyzed the statutory language and agreed with the first two, the Sixth Circuit reached a contrary conclusion. Sensing the need to defend its position against charges of "judicial legislation," the Sixth Circuit characterized its action as not " 'judicial legislation' but rather . . . a judicial harmonization of a statutory package which is admittedly less than a model of clarity." 573 F. 2d at 955, App. C at A15.

Yet, whatever the characterization, the fact remains that the Sixth Circuit has rewritten the statutory language of § 633(b) of the ADEA in direct, clear and unequivocal conflict with the Congressional intent and the interpretation of the law by four other courts of appeals which have decided this issue. If allowed to stand, this decision will create two different and inconsistent jurisdictional standards for individual suits under the ADEA.

II. The Sixth Circuit's Decision That a State Agency Is Not Entitled to Attempt Conciliation Before a Plaintiff Can Resort to Federal Court Seriously Misconstrues the Express Language of the ADEA.

The Sixth Circuit's opinion in this case was based squarely on *Gabriele*. In *Gabriele*, that court addressed this "narrow but important question" of state deferral. 573 F. 2d at 952, App. C at A8. First, the court concluded that a mandatory deferral requirement should not be read into the ADEA despite the facial similarity between ADEA, 29 U. S. C. § 633(b) and the mandatory deferral requirement under Title VII of the 1964 Civil Rights Act, 42 U. S. C. § 2000e-5(c). The principal reason for the difference was the court's belief that the ADEA, unlike Title VII, allows a federal action, once commenced, to "supersede any state action." This provision, the court believed, demonstrated less deference to state procedures.

A second distinction between § 2000e-5(c) and § 633(b) was that Title VII provides that "no charge may be filed . . . before the expiration of sixty days," while the ADEA provides that "no suit may be brought . . . before the expiration of sixty days." This difference, allowing charges to be filed immediately under the ADEA but not under Title VII, was interpreted as further evidence of less deference to state procedures under the ADEA. Third, there is a possibility of concurrent administrative action by the state agency and the Department of Labor under the ADEA. This, too, was interpreted as a further basis for giving less deference to the state procedures. Finally, the court based its decision on the general remedial purposes of the legislation, which it felt would be burdened by forcing an employee to go to a state agency.

Nevertheless, the Sixth Circuit's decision was "judicial legislation" at its worst. In 1967 when Congress passed the ADEA, it decided what it believed would be the preferable and most efficient procedure for settling age discrimination cases. That

procedure provided for both the Department of Labor *and* a state agency to have the opportunity to settle a charge. The Sixth Circuit, however, terming the district court's dismissal in *Gabriel*, a "draconian result," 573 F. 2d at 954, App. C at A13, rewrote the congressional charge handling procedure solely to accommodate an employee who had failed to fulfill the requirements of the Act. In doing so, the court sacrificed the increased potential of informal conciliation by state agencies for the benefit of a negligent federal court plaintiff.

Judge Lively concurred in *Gabriele* for reasons not in issue here, but expressly rejected the reasoning of the majority opinion that a complainant may elect to begin an action in federal court without resorting to an available state agency. He believed that giving a state agency the opportunity "to attempt a solution by conciliation" was "compatible with expressed Congressional concerns for harmonious state-federal regulations in the national enterprise of eliminating unlawful discrimination in employment." 573 F. 2d at 956, App. C at A17.

The four other circuit courts have reached the same conclusion that Congress intended that the states be given the opportunity to resolve age discrimination cases before federal litigation. The Eighth Circuit in *Evans* explained the appropriate procedure:

> "Congress clearly intended that discrimination on the basis of age be remedied as quickly and efficiently as possible . . . . Section 626(d) of the ADEA expressly requires the claimant to notify the Secretary of Labor before filing suit and requires the Secretary [to engage in conciliation] . . . . [Congress] rejected a proposed enforcement procedure that would have subjected ADEA complaints to the same delays that plague the EEOC and NLRB. [Citation omitted.] Instead, the claimant need defer to the Secretary of Labor and the state agency for only sixty days before bringing suit. Thus, in those cases in which the Secretary of Labor or the state agency is able to provide speedy relief, the claimant can escape the delay inherent in any federal court action. On the other hand, if prompt relief cannot be obtained, the claimant may bring an action after waiting only sixty days. Requiring a claimant to seek relief through a state agency designed specifically to handle this type of case is consistent with congressional intent. It increases the chances of conciliation while creating no additional delay, for the sixty-day period of deference to the state agency may run concurrently with the sixty-day period of deference to the Secretary of Labor." ..... F. 2d ....., 17 FEP Cases at 223.

Likewise, the Second Circuit in *Reich*, explained:

> " 'Deference' to state procedures where they exist is fundamental to the ADEA structure.
>
> * * * * *
>
> "Much of Appellant's argument mistakenly proceeds on the tacit premise that resort to the state remedy is a technical step devoid of substantive content, and that, therefore, the slightest showing will warrant setting the bar of Section 633(b) aside. That ignores the paramount circumstances, that the state remedy, or rather remedies, presented appellant with a full and adequate system of relief, and that there was no reason for turning to the federal remedy that did not equally direct the appellant to the state remedies, and that the scheme of the ADEA very explicitly requires that the grievant timely present his claim to the state authority before suing." ..... F. 2d ....., 17 FEP Cases at 367-368.

The Second Circuit in *Reich* also noted that:

> "Failure to meet the sixty-day notice requirements . . . does not extinguish the employee's substantive right; it does terminate the individual's right to commence a private civil action in his own name, but the Secretary retains the right to sue to enforce the grievant's rights wholly without reference to the notice requirements." [Citation omitted.] ..... F. 2d ....., 17 FEP Cases at 365.

Thus, the Sixth Circuit was clearly wrong in its fear of a "draconian result," 573 F. 2d at 954, if a charging party is

forced to comply with the Act. The Secretary of Labor can still bring suit. Thus, a delinquent charging party can have his case heard in federal court. Moreover, as the Congress had planned, this procedure can be followed without sacrificing the possibility of conciliation at the state level. In this light, the conclusions reached by the Third Circuit in a case affirming *Goger* bear repeating. "Private lawsuits are secondary to administrative remedies and suits by the Secretary of Labor." *Rogers* v. *Exxon Research Engineering Co.*, 550 F. 2d 834 at 841 (3rd Cir. 1977), *cert. denied*, No. 76-1451, ... U. S. ....., 98 S. Ct. 749 (January 9, 1978).

The wisdom of the congressional approach is evident from a statistical analysis of ADEA complaints. The number of complaints received by the Department of Labor increased from 1,000 in fiscal 1969 to more than 5,300 in fiscal year 1976 and even more in fiscal year 1977. *Report of Secretary of Labor to Congress pursuant to Section 13 of the ADEA* (1977). With the mandatory deferral procedures now in use, "about 80%" of the complaints are settled at the administrative level. *Statement on Age Discrimination Before the Subcommittee on Retirement Income and Employment of the House Select Committee on Aging*, 95th Cong. 1st Sess. (statement of Solicitor of Labor William J. Kilberg).

CONCLUSION.

The decision of the Sixth Circuit in *Gabriele*, as adopted in the instant case, is in self-pronounced conflict with the Third Circuit's decision in *Goger*. It is also in direct conflict with the Ninth Circuit's decision in *Curry*, the Eighth Circuit's decision in *Evans*, and the Second Circuit's decision in *Reich*. This case thus raises a vital threshold question as to the most appropriate procedure for obtaining swift and efficient relief from the problem of age discrimination.

For the foregoing reasons, Petitioner prays that a Writ of Certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit in this case.

Respectfully submitted,

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APPENDIX A.

No. 76-2195

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

LEWIS SIMPSON,
Plaintiff-Appellant,

vs.

WHIRLPOOL CORPORATION,
Defendant-Appellee.

ORDER

Before: CELEBREZZE, ENGEL, and KEITH, *Circuit Judges.*

This appeal presents several important issues under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-34. The district court dismissed appellant's ADEA complaint on the ground that he had failed to commence proceedings with the Kentucky State agency charged with enforcement of state age discrimination laws before filing this lawsuit. The district court held that such prior resort to the state agency was required by 29 U.S.C. § 633(b). This Court rejected such finding in *Gabriele* v. *Chrysler Corp.*, ... F.2d ..... (6th Cir. 1978), No. 76-2265.

For the reasons set forth in *Gabriele,* the judgment of the district court is reversed and the cause is remanded to the district court for further proceedings consistent with this Court's opinion in *Gabriele.*

It is so ordered.

Entered by Order of the Court
/s/ JOHN P. HELMANN
Clerk

APPENDIX B.

U. S. DISTRICT COURT,

Eastern District of Kentucky

Simpson v. Whirlpool Corporation,

No. 75-71, December 29, 1975

BERNARD T. MOYNAHAN, *Chief Judge*:—This age discrimination case is presently before the Court upon a motion to dismiss filed by the defendant, Whirlpool Corporation.

The pending motion is grounded on the allegation that plaintiff has failed to exhaust his state administrative remedies as required by §14(b) of the Federal Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633(b).

Section 14(b) of the Act reads in pertinent part as follows:

> "(b) In the case of an alleged unlawful practice occurring in a state which has a law prohibiting discrimination in employment because of age and establishing or authorizing a state authority to grant or seek relief from such discriminatory practice, no suit may be brought under § 7 of this Act before the expiration of sixty (60) days after proceedings have been commenced under the state law, unless such proceedings had earlier terminated . . .".

As the above-quoted statutory provisions demonstrate in an age discrimination action brought in Kentucky, an employee must commence proceedings under Kentucky laws prohibiting age discrimination,[1] and those proceedings must be in progress for at least sixty (60) days before plaintiff may file his notice

1. Kentucky Revised Statutes 344.010(4), 344,020(b), 344,180, and 344,190; define discrimination in employment on the basis of age; announce the purpose of the law as guarding against such discrimination; and provide the machinery, via the Kentucky Commission on Human Rights, to prevent unlawful employment practices.

with the Secretary of Labor in preparation for bringing suit. The failure to comply with this prerequisite prohibits the maintenance of an action under this Act. See *Vaughn* v. *Chrysler Corp.*, 382 F.Supp. 143, 145 (E.D. Mich. 1974).

Although the plaintiff has neither alleged nor demonstrated that he filed with the Kentucky Commission on Human Rights a charge of age discrimination concerning his discharge from defendant's employ, plaintiff has established by affidavit that he and his attorney contacted a representative of the Kentucky Department of Labor, who in turn contacted an office of the Kentucky Department of Human Relations.[2] The plaintiff's affidavit goes on to state that a phone call was received by his counsel wherein the Director of the Louisville, Kentucky office of the Kentucky Department of Human Relations advised plaintiff's counsel that, in light of defendant's refusal to undertake any compromise of the claim, nothing could be done by the Commonwealth of Kentucky. Plaintiff's counsel was further advised that plaintiff was free to pursue his federal remedy.

In considering whether equitable considerations might excuse a plaintiff who may have justifiably relied, to his or her detriment, upon official advice in neglecting to exhaust available state remedies, the Court notes that the only apposite case found excusing such negligence, *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13 (3rd Cir. 1974), expressly limited its ruling to the peculiar facts before it. The Court rationalized that the remedial nature of the Act and the absence of any known judicial decision construing § 14(b) of the Act during the relevant period dictated that the plaintiff be allowed a hearing on the merits of his claim. Significantly, the Court saw fit to engraft into its opinion the following caveat:

> "In the future however, we think the Congressional intent that state agencies be given the initial opportunity to act *should be strictly followed.*" 492 F.2d at 17 (Emphasis supplied).

2. Plaintiff in his affidavit is apparently referring to the Kentucky Commission on Human Rights.

It is readily apparent to this forum that the mere placing of a phone call to the state commissioner empowered to deal with plaintiff's grievance does not equate to the commencement of a *proceeding* with that body, as that term is embraced by the Act.

Moreover, the primary consideration motivating the Goger Court is not present here, as case law construing § 14(b) was reasonably available to plaintiff during the period in question.

Therefore, the fact that the plaintiff was informed by a representative of the Kentucky Commission on Human Rights that nothing could be done by the state, in light of defendant's alleged refusal to undertake any compromise of the claim, does not bring into play any equitable considerations that would excuse plaintiff's noncompliance with the clear statutory mandate, as buttressed by existing case law that proceedings must first be commenced with the appropriate state authorities.

On the basis of the foregoing, the Court holds that the plaintiff's failure to allege in his complaint or to demonstrate by affidavit that he made the necessary filing with the Kentucky Commission on Human Rights constitutes a fatal jurisdictional defect leaving the Court no alternative but to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(h)(3), as it finds itself without jurisdiction to entertain same.[3]

An appropriate order shall this day be entered in conformity herewith.

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3. The Court feels compelled to view the pending motion as one for dismissal, rather than treating it as a Rule 56 motion, despite its consideration of plaintiff's affidavit. Federal Rule of Civil Procedure 12(d) provides for the resolution of preliminary questions of jurisdiction to include the obtainment of evidence relevant to the jurisdictional dispute, where, as here, the issue of jurisdiction is not entwined with the actual merits of the controversy. Schramm v. Oakes, 352 F. 2d 143, 149 (10th Cir. 1965); McBeath v. Inter-American Citizens for Decency Committee, 374 F. 2d 359 (5th Cir. 1967), cert. denied 389 U. S. 896; Firemen's Fund Insurance Company v. Railway Express Agency, 253 F. 2d 780 (6th Cir. 1958).

APPENDIX C.

No. 76-2265

U. S. COURT OF APPEALS
SIXTH CIRCUIT

CLEMENT GABRIELE,
Plaintiff-Appellant,

v.

CHRYSLER CORPORATION,
Defendant-Appellee.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

April 7, 1978

Before EDWARDS, CELEBREZZE and LIVELY, *Circuit Judges.*

CELEBREZZE, Circuit Judge, delivered the opinion of the Court, in which Edwards, Circuit Judge, joined. Lively, Circuit Judge, (pp. 13-14) filed a separate concurring opinion.

CELEBREZZE, Circuit Judge. Plaintiff-appellant Clement Gabriele, a former employee of defendant-appellee Chrysler Corporation, filed an action in the district court alleging that his employment was terminated on the basis of age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-34. The district court granted Chrysler's motion for summary judgment based upon Gabriele's failure to timely file an age discrimination complaint with the Michigan Civil Rights Commission (MCRC). 416 F. Supp. 666 (E.D. Mich. 1976). The principal issue raised on appeal is whether timely resort to an agency charged with enforcement of state

age discrimination laws is a prerequisite to filing suit under the ADEA in federal court.[1] We hold that the ADEA imposes no such prerequisite and reverse the judgment.

Gabriele was employed by Chrysler as an engineer from 1965 until he was laid off on May 9, 1975. On August 15, 1975, he filed a complaint with the MCRC alleging age discrimination.[2] On September 3, 1975, he was informed by the MCRC that it could not accept the complaint since it was not filed within ninety days of the alleged discriminatory act, as then required by Michigan law.[3] On November 6, 1975, he filed an action in the district court, alleging that the sixty-day advance notice of intent to sue, required by 29 U.S.C. § 626(d), had been given to the Secretary of Labor, which Chrysler does not contest. Thus, the notice to the Secretary of Labor was necessarily given within the 180-day period set forth in 29 U.S.C. § 626(d)(1).[4]

1. This Court expressly declined to resolve this issue in *Rucker* v. *Great Scott Supermarkets*, 528 F. 2d 393, 394 (6th Cir. 1976).

2. Michigan is a so-called "deferral state" in terms of 29 U. S. C. § 633(b) since it "has a law prohibiting discrimination in employment because of age." Mich. C. L. A. § 37.2202(1)(a), *replacing* Mich. C. L. A. § 423.303a(a), and the MCRC is authorized "to grant or seek relief from such discriminatory practice," Mich. C. L. A. § 37.2602(c)-(d), *replacing* Mich. C. L. A. § 423.307(a). *Eklund* v. *Lubrizol Corp.*, 529 F. 2d 247, 250 n. 4 (6th Cir. 1976); *Rucker* v. *Great Scott Supermarkets*, 528 F. 2d 393, 394 n. 3 (6th Cir. 1976).

3. Mich. C. L. A. § 423.307(b), *repealed by* P. A. 1976, No. 453, § 804, eff. March 31, 1977, which eliminates any statutory limit for filing with the MCRC, apparently leaving the issue to departmental regulations.

4. 29 U. S. C. § 626(d):

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) Within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of

(Footnote continued on next page.)

The district court held that the largely uncontested procedural history deprived it of jurisdiction since it read 29 U.S.C. § 633(b)[5] as mandating prior resort to an appropriate state agency before one could bring suit in federal court. It relied heavily upon cases which have held that provisions of the ADEA should be construed consistently with parallel language in Title VII of the Civil Rights Act of 1964. Noting that 42 U.S.C. § 2000e-5(c),[6] a Title VII provision parallel to § 633(b), has usually been

(Footnote continued from preceding page.)

> notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Gabriel does not need the benefit of the extended period set forth in § 626(d)(2).

5. 29 U. S. C. § 633(b):

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated; *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

6. 42 U. S. C. § 2000e-5(c):

> In the case of an alleged unlawful employment practice occurring in a State or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of

(Footnote continued on next page.)

interpreted to require prior resort to an appropriate state agency before a charge can be filed with the Equal Employment Opportunity Commission (EEOC), the district court imposed a similar requirement on ADEA suits. The court also relied upon cases from this Court which it read as making a timely filing of notice of intent to sue with the Secretary of Labor, § 626(d), a jurisdictional prerequisite to an ADEA suit in federal court. The district court finally noted that Congress must have been aware that some states had shorter filing periods under their age discrimination laws than the 180-day federal period and must have tacitly approved them when enacting the ADEA. This was said to justify the holding that one must not only first file a complaint with the appropriate state agency, but that filing must also be timely under state law, in order to proceed in federal court. The district court was not persuaded by arguments that its holding effectively turned the state filing limit into the federal filing limit, even though the former was only one-half of the latter.

Our research discloses a Third Circuit Court of Appeals decision which addressed the narrow but important question presented herein. *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13 (3d Cir. 1974).[7] In *Goger*, relied upon by the district court, the court held that although § 633(b):

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> this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

7. Goger was followed in *Rogers* v. *Exxon Research and Engineering Co.*, 550 F. 2d 834, 843-44 (3d Cir. 1977), cert. den.,— U. S. ..... (1978).

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> "does not require an aggrieved person to exhaust state remedies as a condition precedent to the institution of a federal suit, it does require that the State be given a threshhold period of sixty days in which it may attempt to resolve the controversy, normally by voluntary compliance." *Id.* at 15.

Its *ratio decidendi* was that § 633(b) was nearly identical to 42 U. S. C. § 2000e-5(c):

> "and courts have repeatedly interpreted the latter as requiring that appropriate state agencies be given a prior opportunity to consider discrimination complaints before resorting to the federal courts. " *Id.* at 15-16 (footnote omitted).

The court could not find anything in the ADEA's legislative history to justify a different interpretation of § 633(b). The court held, however, that equitable considerations in that case excused the plaintiff's failure to resort to the appropriate state

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The issue was discussed but not decided in *Hadfield* v. *Mitre Corp.*, 562 F. 2d 84, 87-88 (1st Cir 1977).

Many district courts have addressed the issue, *E.g.*, *Nickel* v. *Shatterproof Glass Corp.*, 424 F. Supp. 884 (E. D. Mich. 1976) (Joiner, J.) (timely filing not required); *Smith* v. *Jos. Schlitz Brewing Co.*, 419 F. Supp. 770 (D. N. J. 1976) (state filing not required); *Bertrand* v. *Orkin Exterminating Co.*, 419 F. Supp. 1123 (N. D. Ill. 1976) (dictum suggesting state filing not required); *Magalotti* v. *Ford Motor Co.*, 418 F. Supp. 430 (E. D. Mich. 1976) (Feikens, J.) (timely state filing not required); *Fitzgerald* v. *New England Tel. & Tel. Co.*, 416 F. Supp. 617 (D. Mass. 1976) (state filing required); *Bertsch* v. *Ford Motor Co.*, 415 F. Supp. 619 (E. D. Mich. 1976) (Pratt, J.) (state filing generally required but timely federal filing supports action); *Vasquez* v. *Eastern Air Lines, Inc.*, 405 F. Supp. 1353 (D. P. R. 1975) (state filing not required); *Skoglund* v. *Singer Co.*, 403 F. Supp. 797 (D. N. H. 1975) (timely state filing not required); *Vaughn* v. *Chrysler Corp.*, 382 F. Supp. 143 (E. D. Mich. 1974) (Kaess, J.) (state filing required but subject to equitable consideration); *McGarvey* v. *Merck & Co.*, 359 F. Supp. 525, (D. N. J. 1973), *vacated without opinion*, 493 F. 2d 1401 (3d Cir.) *cert. den.*, 419 U. S. 836 (1974) (state filing required).

See Annot., 24 A. L. R. Fed. 808, § 3[c].

agency and the case was remanded to the district court for a hearing on the merits.[8]

Judge Garth filed a concurring opinion in *Goger* in which he agreed that the case should be remanded for consideration of the merits of the complaint. He disagreed, however, that § 633(b)'s similarity to 42 U. S. C. § 2000e-5(c) mandated construing the two statutes similarly. He concluded "there is no requirement that a plaintiff must first attempt to utilize available state remedies before filing suit under the 1967 Act." *Id.* at 17. He approved the position taken there by the Secretary of Labor as *amicus curiae* that resort to a state agency is completely optional and that § 633(b)'s sixty-day waiting period applies only *if* one has chosen to pursue state relief.[9]

We agree with the reasoning of Judge Garth in *Goger* and reject the holding of the majority in that case.[10]

This Court has recognized the parallels between the ADEA and Title VII of the Civil Rights Act of 1964 but has also cautioned against blindly applying Title VII reasoning and results to ADEA cases. *Laugesen* v. *Anaconda Co.*, 510 F. 2d 307, 311-12 (6th Cir. 1975). Transferring the construction of 42 U. S. C. § 2000e-5(c) to § 633(b) is particularly inappropriate.[11] The two statutes are indeed very similar but neither is explicit on the question of whether resort to the appropriate state agency is required before beginning federal action.

8. The court's remand indicates that it did not consider prior resort to a state agency jurisdictional in the sense that absent such fact the district court would not have power to hear the case. Rather, it considered this requirement a statutory condition precedent to suit in federal court, subject to equitable considerations, *Bonham* v. *Dresser Industries, Inc.*, 569 F. 2d 187, 194 (3d Cir. 1977).

9. The Secretary of Labor as *amicus curiae* has taken the same position in this appeal.

10. Comment, *Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act*, 44 U. Chi. L. Rev. 457 (1977).

11. Note, *State Deferral of Complaints Under the Age Discrimination in Employment Act*, 51 Notre Dame Lawyer 492 (1976).

Most courts that have read § 2000e-5(c) as requiring such prior resort have done so because Title VII's legislative history is very clear on that point. *Dubois* v. *Packard Bell Corp.*, 470 F. 2d 973, 975 (10th Cir. 1972); *Crosslin* v. *Mountain States Telephone & Telegraph Co.*, 422 F. 2d 1028, 1030-31 (9th Cir. 1970), *vacated and remanded*, 400 U. S. 1004 (1971); *EEOC* v. *Union Bank*, 408 F. 2d 867, 869-70 (9th Cir. 1968); *Stebbins* v. *Nationwide Mutual Insurance Co.*, 382 F. 2d 267, 268 (4th Cir. 1967), *cert. den.*, 390 U. S. 910 (1968); Eth*ridge* v. *Rhodes*, 268 F. Supp. 83, 89 (S. D. Ohio 1967). There is no similar legislative history accompanying § 633(b), so the rationale behind the prevailing interpretation of § 2000e-5(c) simply does not apply to § 633(b). Indeed there is legislative history suggesting that § 633(b) should be construed differently than § 2000e-5(c). A committee report accompanying the ADEA states that § 633 "provides for *concurrent* Federal and State actions . . .," H. R. Rep. No. 805, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U. S. CODE. CONG. AND ADMIN. NEWS 2213, 2218 (emphasis added), indicating that complaints could originate in either state or federal fora.[12] This is, of course, far from a clear indication that Congress intended § 633(b) to be construed differently than § 2000e-5(c). Our review of the legislative history of the ADEA is only meant to point out the absence of the kind of clear legislative history supporting the construction generally given § 2000e-5(c), thus necessitating consideration of other factors to support our result.

The principal reason we perceive for construing § 633(b) differently than § 2000e-5(c) is found in the language of § 633(a).[13] That provision states that once action is com-

12. Portions of the ADEA were patterned after the Fair Labor Standards Act, further demonstrating that the ADEA was not meant to be a mirror-image of Title VII. H. R. Rep. No. 805, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U. S. Code Cong. and Admin. News 2213, 2218.

13. 29 U. S. C. § 633(a).

> Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to

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menced under the ADEA, it "supersede[s] any State action." Thus, even under Chrysler's view of this action, Gabriele could have totally cut off any state action he might have been required to initiate simply by waiting sixty days and beginning federal action. As Judge Garth said in *Goger*, we

> ". . . do not believe that it was the intent of Congress to require, prior to the institution of a Federal action, the commencement of a State proceeding which, under § 633(b), need not be concluded and which in any event would be superseded by the filing of the Federal action under § 633(a)." 492 F. 2d at 18.

Moreover, § 633(a) has no parallel in Title VII. Title VII also does not require exhaustion of state remedies but only the initiation thereof. *Crosslin* v. *Mountain States Tel. & Tel. Co.*, 422 F. 2d 1028, 1031 n. 5 (9th Cir. 1970), but Title VII has no provision for superseding state proceedings merely by beginning federal action. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1212 (1971). The ADEA thus exhibits lesser deference to the states than does Title VII and gives us no compulsion to require state action as a prerequisite to an ADEA suit.

Another important distinction exists between § 633(b) and § 2000e-5(c). The latter states that "no charge may be filed" until after the sixty-day waiting period. This prevents all federal action during the waiting period, since filing of a charge with the EEOC is a prerequisite to a Title VII suit in federal court. The sixty-day period gives the appropriate state agency two months of exclusive jurisdiction over the discrimination allegation. Section 633(b), on the other hand, says "no suit may be brought" until after the sixty-day waiting period. This only prohibits the filing of a complaint in the district court and contemplates possible

(Footnote continued from preceding page.)

> discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

concurrent administrative action by the state agency and the Department of Labor. *Bonham* v. *Dresser Industries, Inc.*, 569 F. 2d 187, 194, n. 8 (3d Cir. 1977). The absence of a period of exclusive state jurisdiction under the ADEA is thus another indicia of lesser deference to the states under the ADEA than under Title VII. Again, this militates in favor of not requiring prior resort to a state agency before an ADEA suit in federal court.

Another reason for our conclusion is found in the general purposes of the ADEA. It is remedial legislation, designed "to promote employment of older persons based on their ability rather than age," 29 U. S. C. § 621(b), and is entitled to a liberal construction. *Moses* v. *Falstaff Brewing Corp.*, 525 F. 2d 92, 93-94 (8th Cir. 1975); *Skoglund* v. *Singer Co.*, 403 F. Supp. 797, 801 (D. N. H. 1975); *Woodford* v. *Kinney Shoe Corp.*, 369 F. Supp. 911, 914 (N. D. Ga. 1973). The interpretation of § 633(b) by the district court puts an unnecessary burden on all age discrimination complainants and worked a draconian result in this case.[14] The need for quick dispute resolution is acute in the ADEA context since the very cause of the alleged discrimination, age, grows daily. An older person should be allowed to choose the quicker of the two available remedies and not be forced to first choose the state remedy if that would unduly impede a prompt resolution of his grievance.

Chrysler argues that the district court properly relied upon several of this Court's decisions requiring a timely filing of notice of intent to sue with the Secretary of Labor, § 626(d), as a prerequisite to suit in federal court. Initially, we express doubts about the correctness of the reading of those cases by

14. Even the Third Circuit, whence came *Goger*, does not require a timely state filing if the state period is shorter than the federal 180 days. It recognized that this improperly turned the state filing period into the federal filing period. *Bonham* v. *Dresser Industries, Inc.*, 569 F. 2d 187, 194 (3d Cir. 1977). *Cf. Davis* v. *Valley Distributing Co.*, 522 F. 2d 827, 832-33 (9th Cir. 1975), cert. den., 429 U. S. 1090 (1977); *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228, 1232 (8th Cir. 1975) (both Title VII).

both Chrysler and the district court.[15] But even if we accept the idea that we have strictly construed § 626(d), that does not lead to a strict construction of § 633(b). The sections are meant to serve different purposes.

Chrysler finally argues that § 626(d)(2) precludes the result we reach here. That provision extends to 300 days, or thirty days after receipt of notification of termination of state proceedings, whichever is earlier, the time within which notice of intent to sue shall be filed with the Secretary of Labor. But it only does so "in a case to which section 633(b) . . . applies." Chrysler argues that if § 633(b) is interpreted to give an aggrieved

15. This Court's decisions construing § 626(d) have been cited, by Chrysler and others, for the proposition that a timely filing under § 626(d) is a strict jurisdictional prerequisite to suit in federal court. Close examination of those cases, however, reveals that that is not an accurate reading of them. The first case, *Hiscott* v. *General Electric Co.*, 521 F. 2d 632, 633-34 (6th Cir. 1975), did say that the notice requirement was "jurisdictional" but expressly refused to decide whether it could be treated like a statute of limitations which could be tolled or otherwise be subject to equitable considerations since the plaintiff's filing in *Hiscott* was not timely even if tolling doctrines were employed. The second case, *Ott* v. *Midland-Ross Corp.*, 523 F. 2d 1367, 1370 (6th Cir. 1975), merely cited *Hiscott* for the proposition that the § 626(d) filing was "jurisdictional." The last two cases, decided by the same panel on the same day, also relied upon *Hiscott* for the notion that § 626(d)'s requirement was a jurisdictional prerequisite to suit in federal court. *Eklund* v. *Lubrizol Corp.*, 529 F. 2d 247, 249 (6th Cir. 1976); *Rucker* v. *Great Scott Supermarkets*, 528 F. 2d 393, 394 (6th Cir. 1976). Both cases recognized, however, that appropriate facts could warrant relief from § 626(d)'s specific requirements. 529 F. 2d at 250; 528 F. 2d at 395. *See also* the opinions of then Judge, now Solicitor General, McCree in each case. 529 F. 2d at 250-51 (dissenting, on the grounds that equitable relief was warranted); 528 F. 2d at 395 (concurring, on the grounds that equitable relief was not warranted.) This demonstrates that these decisions use the term "jurisdictional" in the loose sense that § 626(d)'s requirements are a condition precedent to suit in federal court and not in the strict sense that noncompliance deprives the district court of power to hear the case, *Dartt* v. *Shell Oil Co.*, 539 F. 2d 1256, 1259-61 (10th Cir. 1976), *aff'd by an equally divided court*, ... U. S. ..... (1977), *Bonham* v. *Dresser Industries, Inc.* 569 F. 2d 187, 192 (3d Cir. 1977). *Cf. Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924, 928, (5th Cir. 1975) (Title VII). *But cf. Powell* v. *Southwestern Bell Tel. Co.*, 494 F. 2d 485, 487-89 (5th Cir. 1974).

person an option to commence either state or federal action then the "anomalous result" is that one who deliberately bypasses the state agency still gets the benefits of the extended filing period merely by virtue of being in a "deferral state."[16] This possible result may or may not be "anomalous" but we believe it is incorrect in any event. One obtains the benefits of the extended filing period in § 626(d)(2) *only* if he is in a "deferral state" *and* elects to use that state's mechanisms to attempt a conciliation of the grievance. *Cf. Skoglund* v. *Singer Co.*, 403 F. Supp. 797, 803 (D. N. H. 1975). It is only if one uses time to let the state try its hand that he needs more time to notify the Secretary of Labor. Furthermore, any state filing need only be made within the minimum 180 days allowed for the federal filing, § 626(d)(1), in order to obtain the benefits of § 626(d)(2). *Cf. Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228, 1232 (8th Cir. 1975) (Title VII). *Contra, Bonham* v. *Dresser Industries, Inc.*, 569 F. 2d 187, 192 n. 5 (3d Cir. 1977). To require the state filing to be timely under a shorter state period would improperly elevate state law over federal law. If the state filing is not timely under state law, presumably the complainant would not get the full 300 days to file with the Secretary of Labor since § 626(d)(2) also imposes a limit of within thirty days of receipt of notification of termination of state proceedings, if that is earlier than 300 days.[17] This will prevent undue manipulation of the filing limits by an aggrieved person.

Chrysler contends that this interpretation of §§ 633(b) and 626(d)(2) amounts to "judicial legislation." We disagree. Congress stated in § 626(d)(2) that the extended filing period applies only in cases "to which Section 633(b) . . . applies" and our construction of § 633(b) is that it does *not* apply if an aggrieved person does not elect to proceed with available state

16. See note 2, *supra*.

17. One obviously always has 180 days to notify the Secretary of Labor, pursuant to § 626(d)(1), even if § 626(d)(2) is applicable and thirty days elapse after he receives notice of termination of state proceedings before the 180 day period expires.

remedies. This is far from "judicial legislation" but rather is a judicial harmonization of a statutory package which is admittedly less than a model of clarity. This is a proper function for courts and one we are called upon to perform regularly.

We determine that 29 U. S. C. § 633(b) does not require prior resort to an available state agency as a prerequisite to an ADEA suit in federal court. Rather, it gives an aggrieved person the option of pursuing state remedies. If that option is elected, then the state agency must be given the required sixty days to attempt to reconcile the dispute before a suit can be filed in federal court, unless state proceedings are earlier terminated.[18] The election of first pursuing state remedies, permitted at any time within 180 days of the alleged discriminatory practice, is also required to take advantage of the extended filing period set forth in § 626(d)(2) regarding the notice of intent to sue given to the Secretary of Labor. If an aggrieved person does not elect to pursue available state remedies, then he may bring suit directly in federal court, subject to the sixty-day notice provision of § 626(d).[19]

The judgment of the district court is reversed and the cause is remanded for further proceedings consistent with this opinion.

Concurring Opinion

LIVELY, *Circuit Judge*, concurring: —I concur in the result, but am unable to accept all of the reasoning of the majority opinion. In particular, I am not persuaded that the legislative history of ADEA leads to the conclusion that a complainant in a "deferral state" may elect to begin an action in federal court without any resort to the state agency. The majority quotes a

18. If a suit is filed before the expiration of the sixty-day period, the district court need not dismiss the complaint but should hold the case in abeyance for the requisite period of time. *Cf. Mitchell* v. *Mid-Continent Spring Co.*, 466 F. 2d 24, 26-27 (6th Cir. 1972), *cert. den.*, 410 U. S. 928 (1973) (Title VII).

19. See notes 4 & 15, *supra*, concerning when that notice must be filed with the Secretary of Labor.

fragment from the House Report in support of this determination. However, when read in its entirety, the paragraph from which that quotation is taken leads me to the opposite conclusion. That paragraph reads:

> Federal-State relationship
>
> Section 14 provides for concurrent Federal and State actions, except that in States having laws prohibiting discrimination in employment because of age, no suit may be brought under this act before the expiration of 60 days after proceedings have been commenced under the State law (120 days during the first year after the effective date of the State law), unless such proceedings have been earlier terminated, and commencement of an action under this act shall be a stay on any State action previously commenced. H. R. Rep. No. 805, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U. S. Code. Cong. and Adm. News 2213, 2218-19.

The language following the word "except" in the above quotation denotes a Congressional deference to state agencies. This language, together with the "superseding clause" cited by the majority, 29 U. S. C. § 633(a), establishes a procedure under which a complainant in a deferral state must first initiate proceedings with the state agency, giving that agency 60 days in which to attempt a solution by conciliation, but is not required to continue to pursue state remedies after the expiration of that period. Such a construction is compatible with expressed Congressional concerns for harmonious state-federal regulations in the national enterprise of eliminating unlawful discrimination in employment practices. Statements of these concerns abound in the legislative history of both Title VII and ADEA.

However, untimely resort to the state agency for attempted conciliation should not deprive a claimant of his right to seek relief in a federal court where the state allows less than 180 days for filing. I would adopt the following language from the Third Circuit's opinion in *Bonham* v. *Dresser Industries, Inc.*, 569 F. 2d 187 (3d Cir. 1977):

We do not think that it was the intent of Congress to allow states to shrink the federal remedy for age discrimination by imposing limitation periods shorter than the federal ones. If compliance with Pennsylvania's 90-day filing period is deemed a jurisdictional condition precedent to suit under the ADEA, the federal 180-day limitations period becomes 90 days for residents of Pennsylvania, and the availability of the federal remedy is seriously undermined. *Cf. Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1288 (8th Cir. 1975) (Title VII). Moreover, any equitable grounds for relaxing the federal limitations period would evaporate if not recognized by the state.

We do not hold that the mere existence of a state limitations period which is shorter than the federal one relieves a plaintiff of his obligation to bring his complaint to the attention of the state authorities. Rather, we hold only that if plaintiff files his complaint with the state agency within the federal 180-day period, the state's conclusion that the filing is untimely under state law will not bar the federal suit. We think this rule is in accord with Congressional intention, consistent with *Goger* and *Rogers*, and compelled by our conclusion that the federal 180-day requirement is itself in the nature of a statute of limitations and subject to equitable modification. 569 F. 2d at 194 (footnote omitted).

APPENDIX D.

ADEA, 29 U. S. C. § 626(d):

No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—

> (1) Within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

ADEA, 29 U. S. C. § 633(b):

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed

statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e-5(c):

In the case of an alleged unlawful employment practice occurring in a State or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

Kentucky Fair Employment Practices Act, Sec. 344.040. Unfair Employer Practices. It is an unlawful practice for an employer:

(1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, national origin, sex, or age between forty and sixty-five. . . .

* * * * *

Sec. 344.200. Filing of Complaint; Efforts to Conciliate. (a) An individual claiming to be aggrieved by an unlawful practice, a member of the Commission, or the Attorney General may file with the Commission a written sworn complaint stating that an unlawful practice has been committed, setting forth the facts upon which the complaint is based, and setting forth facts sufficient to enable the Commission to identify the persons charged (hereinafter the respondent). The Commission staff or a person designated pursuant to its rules shall promptly investigate the allegations of unlawful practice set forth in the complaint and shall within 5 days furnish the respondent with a copy of the complaint. The complaint must be filed within 180 days after the alleged unlawful practice occurs.

* * * * *

(4) If the staff determines, after investigation, or if the Commission determines after the review provided for in subsection (3) that there is probable cause to believe that the respondent has engaged in an unlawful practice, the Commission staff shall endeavor to eliminate the alleged unlawful practice by conference, conciliation and persuasion.

* * * * *

Sec. 344.210. Hearings. (1) Within 60 days after a complaint is filed, unless the Commission has issued an order dismissing the complaint or stating the terms of a conciliation agreement or within 30 days after an application for review is filed under this act, the Commission shall serve on the respondent by registered or certified mail a written notice, together with a copy of the complaint as it may have been amended, requiring the respondent to answer the allegations of the complaint at a hearing. . . .

* * * * *

Sec. 344.230. Dismissal of Complaint. (1) If the Commission determines that the respondent has not engaged in an unlawful practice, the Commission shall state its findings of

fact and conclusions of law and shall issue an order dismissing the complaint. . . .

(2) If the Commission determines that the respondent has engaged in an unlawful practice, the Commission shall state its findings of fact and conclusions of law and shall issue an order. . . .

* * * * *

Sec. 344.240. Judicial Review. (1) A complainant, respondent, or intervenor aggrieved by an order of the Commission, including an order dismissing a complaint or stating the terms of a conciliation agreement, may obtain judicial review, and the Commission may obtain an order of the court for enforcement of its order, in a proceeding brought in the circuit court in a county in which the alleged unlawful practice which is the subject of the order or complaint occurs or in which a respondent resides or has his principal place of business.

Supreme Court, U.S.
FILED
SEP 5 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 78-53

WHIRLPOOL CORPORATION - - - Petitioner

versus

LEWIS SIMPSON - - - - - Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 78-53

WHIRLPOOL CORPORATION - - - - - *Petitioner*

v.

LEWIS SIMPSON - - - - - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Lewis Simpson, prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be denied for the reasons hereinafter set out.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit dated May 10, 1978, No. 76-2195, reversing the dismissal of Respondent's Complaint by the District Court for the Eastern District of Kentucky, is correctly reproduced as Appendix "A", page A 1, with Petition for Writ of Certiorari.

The Opinion cited by the Court of Appeals for the Sixth Circuit as authority for the disposition of this case of Gabriele v. Chrysler Corporation, is correctly reproduced as Appendix "C" with the Petition and is reported in 573 Federal Reporter 2nd 954.

The Opinion of the District Court for the Eastern District of Kentucky dismissing Respondent's Complaint is correctly reproduced as Appendix "B" with the Petition.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition for Writ of Certiorari.

QUESTIONS PRESENTED

I. Was the Court of Appeals for the Sixth Circuit correct in determining that prior resort to and exhaustion of State proceedings was not a jurisdictional prerequisite to filing suit in Federal District Court for violation of Federal Age Discrimination in Employment Act of 1967, 29 USC §§ 621-634, particularly § 633(b)?

II. Did Respondent's prior resort to the Secretary of Labor of the United States deprive state authorities of any jurisdiction under the Provisions of the Kentucky Revised Statutes Section 344.270?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are: 29 USC § 626(c) and 29 USC §§ 633(a) and 633(b) which provide:

> "(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter."
>
> "(a) Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action."
>
> "(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the

filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority."

and Kentucky Revised Statutes § 344.270 providing:

"Neither the Commission nor any court of this state shall take jurisdiction over any claim of an unlawful practice under this chapter while a claim of the same person seeking relief for the same grievance is pending. A final determination of a claim alleged in an unlawful practice under this chapter shall exclude any other action or proceeding brought by the same person based on the same grievance."

STATEMENT OF THE CASE

Respondent, Lewis Simpson, after more than twenty-five years of employment by Petitioner, Whirlpool Corporation, in positions of great responsibility and after numerous commendations for outstanding performance, was threatened with termination of his employment at the end of six months unless within that time he complied with certain nebulous, confusing and uncertain recommendations of a new and younger supervisor, determined to rid the company of older employees. To avoid a forfeiture of his employee benefits and preserve whatever rights would accrue as an employee in good standing upon his resignation, Simpson tendered his resignation and notified the United

States Secretary of Labor of the violation of his rights under the Age Discrimination in Employment Act of 1967 (ADEA). Together with his counsel he attended a conciliation conference conducted by a representative of the United States Department of Labor at which agreement was determined to be impossible and from there went to the office of the Director of Labor Standards of the Kentucky Department of Labor at Frankfort, Kentucky, to learn where and in what form a complaint should be made to state authorities of the age discrimination which Petitioner had practiced upon him.

The Kentucky Director of Labor Standards advised Respondent such complaints were handled at the Louisville, Kentucky, office and suggested that he, the director, would call that office and allow Respondent to discuss his problem with that office, which he did. No record of that call was preserved but the evidence of the director confirmed the call by Petitioner.

The following day Petitioner's counsel was notified by the Louisville, Kentucky, office of the Kentucky Department of Labor that since Petitioner had elected to complain to Federal authorities and desired to file suit in Federal District Court he was free to do so. No record of this call was kept, but the testimony of the Executive Director of the Kentucky Commission on Human Rights and of his first assistant confirmed that at that time it was routine for the Department to so advise those contemplating federal action.

Suit was timely filed by Respondent in Federal District Court for the Eastern District of Kentucky.

Upon Petitioner's Motion to Dismiss for failure to file a written complaint with state authorities before commencing federal action the District Judge felt compelled to sustain Petitioner's Motion under the authority of Goger v. H. K. Porter, 492 F. 2d 13 (3rd Cir. 1974) as set forth in his Opinion (Appendix B of Petition).

Upon appeal to the United States Court of Appeals for the Sixth Circuit that Court reversed the Judgment of the District Court and remanded the case for further proceedings consistent with its Opinion in Gabriele v. Chrysler Corporation, 573 F. 2d 954. Petitioner seeks relief from that Order in this Petition for Writ of Certiorari.

ARGUMENT

I. Was the Court of Appeals for the Sixth Circuit Correct in Determining That Prior Resort to and Exhaustion of State Proceedings Was Not a Jurisdictional Prerequisite to Filing Suit in Federal District Court for Violation of Federal Age Discrimination in Employment Act of 1967, 29 USC §§ 621-634, Particularly § 633 (b)?

(A) First let it be pointed out that the cases of Goger v. H. K. Porter, 492 F. 2d 13 (3rd Cir. 1974) and Evans v. Oscar Mayer & Co., 17 FEP (8th Cir.) upon which Petitioner so heavily relies, are no longer authorities for Petitioner's position. Goger has been repudiated by the United States Court of Appeals for the Third Circuit, the Court which decided the case, in an unreported opinion in the case of James R. Holliday

v. Ketchum, MacLeod & Grove, Inc., et al., decided July 14, 1978, and reproduced herewith as Appendix "B".

The opinion in Evans v. Oscar Mayer & Company cited on page 6 of the Petition was withdrawn by the Court of Appeals for the Eighth Circuit and the opposite conclusion reached in an opinion yet unpublished which is reproduced herewith marked Appendix "B".

(B) It would be presumptuous of this writer to assume that improvement could be made on the reasoning of the Courts of Appeals for the Third, Sixth and Eighth Circuits as set out in Gabriele, Holliday and Evans, *supra,* as well as the opinion of the District Court in Vasquez v. Eastern Air Lines, 405 F. Supp. 1353 (D. C. Puerto Rico, 1975). Further attempt to justify the Order of the Court of Appeals for the Sixth Circuit reversing the dismissal of Respondent's suit in this case would be an imposition upon this Court and no further attempt to do so will be made here.

II. Did Respondent's Prior Resort to the Secretary of Labor of the United States Deprive State Authorities of Any Jurisdiction Under the Provisions of the Kentucky Revised Statutes Section 344.270?

(A) The provisions of KRS 344.270 depriving the state of all jurisdiction in matters involving age discrimination while such a claim is pending by the same person. Whether it is unique or not, other cases do not deal with the provision or its effect upon an injured party's right to seek relief under Federal law. It is submitted that, upon being informed by Respondent

that he had made a complaint to the United States Department of Labor, the officials of the State Labor Department gave the only answer they could give under the provisions of this Statute and that was that Petitioner was free to proceed with an action in Federal Court.

(B) It is true that this question was never reached or decided in the Circuit Court of Appeals. However, it is submitted that had the Circuit Court reached a different conclusion with regard to the requirement of a resort to state authority before bringing action in Federal Court, it would probably have reversed the District Court in this case because of the foregoing provision of the Kentucky Statutes and the resulting conflict with the Federal Act.

Further, we believe it to be impossible to reconcile this provision of the Kentucky Statutes with the provisions of § 633(a) that commencement of an action under the act shall supersede any state action. The simple truth is that any construction other than that adopted by the Court of Appeals in this and the Gabriele case would involve an exercise in futility of resorting to some type of complaint to state authority with no requirement to bring it to any conclusion since filing a federal action would supersede it any way.

(C) Finally, an examination of the Kentucky Age Discrimination Statute will show that its provisions fall far short of the provisions of the federal act insofar as protecting an injured employee. There are only injunctions and small fines provided for the offending

employee and the right to resort to state courts for redress of grievances.

There is a serious question which could be raised as to whether the Kentucky Age Discrimination Law complies at all with the § 633(b) as a State having

> "* * * a law prohibiting discrimination in employment because of age and establishing or authorizing a state authority to grant or seek relief from such discriminatory practice. * * *"

Because it is not the basis of the ruling of the Court of Appeals for the Sixth Circuit and is of relatively minor importance by comparison to the real reason for the ruling of the Court in this case further discussion of this issue will not be undertaken. Nevertheless, it is present and should be discussed further in the event the Court does not agree with the Court of Appeals on the basis of its opinion herein.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 77-1692

JOSEPH W. EVANS, - - - - - - - - Appellee,

v.

OSCAR MAYER & Co.,
ROBERT M. BOLZ,
N. D. OTTENS,
DONALD L. PAUL, and
PAUL F. GOULD, - - - - - - - - *Appellants.*

Appeal from the United States District Court for the Southern District of Iowa.

OPINION ON REHEARING

Before BRIGHT and HENLEY, Circuit Judges, and TALBOT SMITH, Senior District Judge.*

HENLEY, Circuit Judge.

Joseph W. Evans brought this suit against his employer, Oscar Mayer & Co., and its executives,[1] charging that they had forced him into early retirement in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C.

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*TALBOT SMITH, United States Senior District Judge, Eastern District of Michigan, sitting by designation.

[1]In this opinion we shall refer to the defendants collectively as "Oscar Mayer."

§§ 621-634 (1970). Oscar Mayer moved to dismiss the action for want of jurisdiction. The district court denied the motion and certified this interlocutory ruling for appeal under 28 U.S.C. § 1292(b) (1970), stating that the order presented a "controlling question of law as to which there is substantial ground for difference of opinion" and "that an immediate appeal . . . may materially advance the ultimate outcome of the litigation." This court thereafter permitted this appeal.

The case was argued and submitted on January 12, 1978, and was decided on April 5 of this year. A majority of the court voted to vacate the order of the district court and to remand the case for further proceedings. Thereafter, the plaintiff-appellee filed a petition for rehearing and suggestions for rehearing en banc. Plaintiff was supported in his position by the Secretary of Labor who is charged with the duty of enforcing ADEA but who was not a party to the original action. The Secretary was permitted to file an amicus curiae brief taking the position that the district court had jurisdiction of the case, and that the original determination of the district court was correct.

In his brief the Secretary pointed out that two days after our original decision was announced, the Court of Appeals for the Sixth Circuit had reached an opposite result in *Gabriele* v. *Chrysler Corp.*, ____ F. 2d ____ (6th Cir. No. 76-2265 April 7, 1978), and that that court had adhered to *Gabriele* in an order entered on April 10, 1978 in *Simpson* v. *Whirlpool Corp.*, ____ F. 2d ____ (6th Cir. No. 76-2195 April 10, 1978).

We have given careful consideration to the matter. We grant rehearing, withdraw our original opinion and substitute this one in its stead. This time, we affirm the order of the district court.

Joseph Evans worked for Oscar Mayer & Co. in Davenport, Iowa for twenty-three years before his retirement on January 31, 1976. On March 10, 1976 Evans notified the

Secretary of Labor, as required by 29 U.S.C. § 626(d),[2] that he intended to sue Oscar Mayer under the ADEA. He filed the present action in federal district court on May 7, 1977. Thereafter Oscar Mayer moved to dismiss the action for lack of subject matter jurisdiction, arguing that Evans had not fulfilled a jurisdictional requirement under 29 U.S.C. § 633(b) because he did not first file charges with the Iowa Civil Rights Commission. The district court concluded that filing charges with an appropriate state agency is not a jurisdictional prerequisite to an action in federal court. It therefore denied the motion, and Oscar Mayer appealed.

Section 633(b) of the ADEA reads as follows:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, *no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law,* unless such proceedings have been earlier terminated: *Provided,* That such sixty-day period shall

---

[2]Section 626(d) provides:

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority. [Emphasis added.]

Iowa has a law prohibiting age discrimination in employment,[3] and the Iowa Civil Rights Commission has the authority to seek relief from such practices. The narrow issue raised on appeal is whether filing a claim with the State Agency is a prerequisite to a suit under the ADEA.

A definitive answer cannot be found in either the language of the statute, its legislative history, or the policy behind it. The extensive discussions found in *Vazquez* v. *Eastern Air Lines, Inc.*, 405 F. Supp. 1353 (D. P.R. 1975) (filing with state agency not required), and *Bertsch* v. *Ford Motor Co.*, 415 F. Supp. 619 (E.D. Mich. 1976) (filing with state agency is required), demonstrate that substantial support can be found for either conclusion. Several courts have determined that deference to an appropriate state agency is required by the ADEA, *see Reich* v. *Dow Badische Co.*, ___ F. 2d ___, 17 FEP Cases 363 (2d Cir. No. 76-7637, April 4, 1978), including the dissenting opinion of Judge Feinberg; *Curry* v. *Continental Airlines*, 513 F. 2d 691 (9th Cir. 1975); *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13 (3d Cir. 1974); *Gabriele* v. *Chrysler Corp.*, 416 F. Supp. 666 (E.D. Mich. 1976), *rev'd*, ___ F. 2d ___ (6th Cir. 1978), *supra*; *Fitzgerald* v. *New England Telephone & Telegraph Co.*, 416 F. Supp. 617 (D. Mass. 1976), *modified*, 437 F. Supp. 633 (1977); *Berry* v. *Crocker Nat'l Bank*, 13 FEP

[3] Iowa Code Ann. § 601A.6 (1975).

Cases 673 (N.D. Cal. 1976), while other courts have held it to be optional, *see Bertrand* v. *Orkin Exterminating Co.*, 419 F. Supp. 1123 (N.D. Ill. 1976); *Smith* v. *Jos. Schlitz Brewing Co.*, 419 F. Supp. 770 (D. N.J. 1976); *Magalotti* v. *Ford Motor Co.*, 418 F. Supp. 430 (E.D. Mich. 1976); *Skoglund* v. *Singer Co.*, 403 F. Supp. 797 (D. N.H. 1975).

While it is obvious that the authorities are in conflict, and the question is not free from doubt, we think that the preferable view is that taken by the Court of Appeals for the Sixth Circuit in *Gabriele, supra*, and which is also expressed in the concurring opinion of Judge Garth in *Goger* v. *H. K. Porter Co., supra*, 492 F. 2d at 17-18. We now hold that if an individual complaining about alleged discrimination against him in employment on account of his age in fact files a complaint with a state fair employment practice agency like the Iowa Civil Rights Commission, he must observe the waiting period prescribed by § 633(b). We do not think, however, that an individual is required to file a complaint with the state agency before coming into federal court, assuming that he complies with the basic waiting period prescribed by § 626(d). In our opinion such an individual has the option of proceeding first before the state agency and then in the federal court or of proceeding initially in the federal court without prior resort to the state agency.

The views here expressed are in accord with the interpretation that the Secretary places on § 633(b), and it goes without saying that his interpretation of the Act is entitled to great weight. *See, e.g., Van Wyk* v. *Bergland, Secretary of Agriculture*, 570 F. 2d 701, 704 (8th Cir. 1978), and cases cited.

Affirmed.

BRIGHT, Circuit Judge, dissenting.

I respectfully dissent.

In my judgment, in a state such as Iowa, which has laws prohibiting age discrimination and an agency with author-

ity to seek relief from such practice, filing a charge with the state agency is mandatory under the ADEA and is a prerequisite to the filing of an action in federal court, subject, however, to certain equitable consideration. *See Reich* v. *Dow Badische Co.*, 17 FEP Cases 363, 368 (2d Cir. 1978); *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13, 16 (3d Cir. 1974).

Congress clearly intended that discrimination on the basis of age be remedied as quickly and efficiently as possible, for lengthy delays in the courts and administrative agencies could deprive older workers of an effective remedy. Section 626(d) of the ADEA expressly requires the claimant to notify the Secretary of Labor before filing suit and requires the Secretary to "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." Although Congress patterned much of the ADEA after Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1970), and other labor statutes, it rejected a proposed enforcement procedure that would have subjected ADEA complaints to the same delays that plague the EEOC and NLRB. *Vazquez* v. *Eastern Air Lines, Inc., supra,* 405 F. Supp. at 1354-55. Instead, the claimant need defer to the Secretary of Labor and the state agency for only sixty days before bringing suit. Thus, in those cases in which the Secretary of Labor or the state agency is able to provide speedy relief, the claimant can escape the delay inherent in any federal court action. On the other hand, if prompt relief cannot be obtained, the claimant may bring an action after waiting only sixty days. Requiring a claimant to seek relief through a state agency designed specifically to handle this type of case is consistent with congressional intent. It increase the chances of conciliation while creating no additional delay, for the sixty-day period of deference to the state agency may run concurrently with the sixty-day period of deference to the

Secretary of Labor. *Bertsch* v. *Ford Motor Co., supra,* 415 F. Supp. at 623.

Moreover, the pertinent language of section 633(b) is nearly identical to language in Title VII:

> In the case of an alleged unlawful employment practice occurring in a State * * * which has a * * * law prohibiting the unlawful employment practice alleged and establishing or authorizing a State * * * authority to grant or seek relief from such practice * * *, no charge may be filed * * * by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State * * * law, unless such proceedings have been earlier terminated * * *. [42 U.S.C. § 2000e-5(b) (1970) (currently at § 2000e-5(c)).]

This language of Title VII requires that state agencies be afforded an opportunity to consider the employment discrimination before suit for redress may be brought in a federal court. *See Love* v. *Pullman Co.*, 404 U. S. 522 (1972); *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228 (8th Cir. 1975).

In the present cases, however, I would not dismiss the action outright, even though Evans failed to file a charge with the state agency. That requirement is not "jurisdictional"; it is a procedural requirement, which may be subject to equitable modification when necessary to effect the broad remedial purposes of the statute. A similar principle has been applied in interpreting various procedural requirements under Title VII, *see Lacy* v. *Chrysler Corp.*, 533 F. 2d 353 (8th Cir.), *cert. denied,* 429 U. S. 959 (1976); *Tuft* v. *McDonnell Douglas Corp.*, 517 F. 2d 1301 (8th Cir. 1975), *cert. denied,* 423 U. S. 1052 (1976); *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924 (5th Cir. 1975); *Franks* v. *Bowman Transportation Co.*, 495 F. 2d 398 (5th

Cir. 1974), *rev'd on other grounds,* 424 U. S. 747 (1976), and I feel it should apply to the present case.

In his resistance to Oscar Mayer's motion to dismiss, Evans argued that he had relied on official advice from the Department of Labor that the only requirement under the ADEA was notice to the Secretary of Labor. Moreover, Evans had no interpretation of section 633(b) by this court to guide him. *See Goger* v. *H. K. Porter Co.,* 492 F. 2d 13, 16-17 (3d Cir. 1974). The district court did not reach this question in disposing of Oscar Mayer's motion. I would, therefore, vacate the district court's order and remand for further proceedings on the motion to dismiss.

July 6, 1978

A true copy.
Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1867

JAMES R. HOLLIDAY,
Appellant

v.

KETCHUM, MACLEOD & GROVE, INC., a corporation; EDWARD T. PARRACK; WILLIAM H. GENGE; CHARLES E. McHUGH; and JAMES E. FULLER

(D.C. Civil No. 77-140)

Appeal from the United States District Court for the Western District of Pennsylvania

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Argued February 24, 1978

BEFORE: ADAMS and HIGGINBOTHAM, *Circuit Judges,* and BECHTLE* *District Judge*

Reargued May 11, 1978 In Banc

BEFORE: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, and HIGGINBOTHAM, *Circuit Judges*

OPINION OF THE COURT
(Filed July 14, 1978)

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*Honorable Louis C. Bechtle, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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GARTH, *Circuit Judge.*

The question before us today is the very same question which a panel of this court answered in 1974: must a private plaintiff who charges employment discrimination in violation of the federal Age Discrimination in Employment Act of 1967 (ADEA)[1] be required to utilize state remedies before filing a suit in federal court? In 1974, a majority opinion of a panel of this court answered that question in the affirmative, holding that initial resort to state remedies was required. *Goger* v. *H. K. Porter Co.,*

[1]Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified *as amended* at 29 U.S.C. §§ 621 *et seq.*)).

Inc., 492 F. 2d 13 (3d Cir. 1974).[2] Today, having reconsidered this issue, we have arrived at a different answer. Thus we overrule *Goger*[3] and hold that resort to state age discrimination remedies is not a precondition to maintaining a federal suit for age discrimination.

I

On April 15, 1957, James R. Holliday entered into employment with Ketchum, MacLeod & Grove, Inc. (Ketchum), an advertising agency. Holliday served in the position of production manager at Ketchum for some nineteen years, until January 30, 1976. On that date, Holliday, age 57, was terminated. Ketchum contends that Holliday was "involuntarily retired" "pursuant to the early retirement provisions of Ketchum's pension plan."[4] Holliday claims that Ketchum illegally discriminated against him because of his age, and that as a result he has suffered injury.[5]

[2]The majority opinion in *Goger,* although holding that initial state resort was essential, nevertheless permitted Goger's federal action to proceed on the basis of equitable considerations. The *Goger* concurrence, while disagreeing with the majority opinion's statutory analysis, reached the same result, and concluded as we do today that the ADEA permits, but does not require, initial resort to state remedies. 492 F. 2d at 17-18.

[3]The Internal Operating Procedures of this circuit provide that an in banc court is permitted to overrule a previous panel decision of this court. IOP § M. 2 (1974).

[4]Appellee's Brief at 4-5. *See* United Air Lines, Inc. v. McMann, 46 U.S.L.W. 4043, 4046 (U.S. Dec. 12, 1977) ("we find nothing to indicate Congress intended wholesale invalidation of retirement plans instituted in good faith before [the ADEA's] passage"), *superseded by* Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978) (codified at 29 U.S.C.A. § 623(f)(2) (Supp. 1 June, 1978)) ("no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual").

[5]Complaint ¶¶ 12-17. *See* 29 U.S.C.A. § 623(f)(2) (Supp. 1 June, 1978), *quoted* n. 4 *supra;* H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 8, *reprinted in* [1978] U.S. Code Cong. & Ad. News 1000, 1001 (retirement plans in effect before the enactment of the ADEA are *not* exempt from § 623(f)(2)).

Holliday initially sought redress by filing a notice under the ADEA with the Secretary of Labor (Secretary).[6] Holliday filed his notice on July 15, 1976—one hundred sixty-eight (168) days following his discharge—thereby complying with the ADEA's one hundred eighty (180) day limitations period for notifying the Secretary of age discrimination complaints.[7] Holliday however did not file an age discrimination claim with the Pennsylvania Human Relations Commission (Commission)[8] until August 5, 1976—one hundred eight-nine (189) days following his discharge. The Commission dismissed Holliday's complaint as untimely, because discrimination complaints must be filed with the Commission "within ninety days after the alleged act of discrimination."[9]

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[6]29 U.S.C. § 626(d) (prior to 1978 amendment) provided in relevant part:

> No civil action may be commenced by any individual . . . until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred . . . .

Section 626(d), *as amended*, Pub. L. No. 95-256, § 4(b)(1), 92 Stat. 190, 191 (1978) (reproduced at 46 U.S.L.W. 51 (May 9, 1978)) requires that a litigant file a "charge" rather than a "notice of intent" with the Secretary.

[7]*See* n. 6 *supra*.

[8]The Pennsylvania Human Relations Act, Pa. Stat. Ann. tit. 43, §§ 951 *et seq.* (Purdon 1964 & Supp. 1978), prohibits among other things age discrimination in employment against those between the ages of forty and sixty-two. *Id.* §§ 952, 953, 954(h), 955. The statute establishes the Pennsylvania Human Relations Commission as the agency which has the power *inter alia* "[t]o adopt, promulgate, amend and rescind rules and regulations to effectuate the policies and provisions of this act," *id.* § 957(d); "[t]o initiate, receive, investigate and pass upon complaints charging unlawful discriminatory practices," *id.* § 957(f); "[t]o hold hearings, subpoena witnesses," *id.* § 957(g); and "[t]o prepare and distribute fair practices notices," *id.* § 957(*l*).

[9]*Id.* § 959, ¶ 7 (Purdon Supp. 1977).

In view of our disposition, we need not reach Holliday's contention that he satisfied the ADEA's state resort requirement by

(Footnote continued on following page)

In light of the Commission's dismissal of Holliday's claim, the district court granted Ketchum's motion to dismiss Holliday's federal complaint. The district court reasoned that under *Goger* and its progeny, "by failing to timely file with the [Commission] the Plaintiff has not afforded the state agency a reasonable opportunity to resolve the matter . . . and his [federal] suit is jurisdictionally defective."[10]

Holliday appealed.

II

Section 623(a) of Title 29, United States Code, provides that:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age;* . . . (Emphasis added).[11]

A complainant seeking to invoke the protective provisions of the ADEA must, as noted, comply with certain

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(Footnote continued from preceding page)

filing a state age discrimination claim 189 days following the challenged act. *Cf.* Bonham v. Dresser Indus., Inc., 569 F. 2d 187 (3d Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3695 (U.S. May 1, 1978) (No. 77-1562) (untimely state filing will not preclude federal suit if state age discrimination claim filed within 180 days).

[10]Holliday v. Ketchum, MacLeod & Grove, Inc., Civ. Action No. 77-140, Memorandum Op. at 2 (W.D. Pa. May 6, 1977); *Id.*, Order dated May 6, 1977.

[11]Discussions of age discrimination and of the ADEA are furnished in Note, *The Age Discrimination in Employment Act of 1967*, 90 Harv. L. Rev. 380 (1976); Note, *Age Discrimination in Employment*, 50 N.Y.U.L. Rev. 924, 945-51 (1975). The 1978 amendments to the ADEA are highlighted in Explanatory Notes, 46 U.S.L.W. 53-57 (May 9, 1978).

time limits for filing a notice with the Secretary.[12] In addition, the relevant portion of section 14(b) of the ADEA, 29 U.S.C. § 633(b), provides as follows:

> Federal-State relationship
>
> . . .
>
> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title [*quoted in part in* n.6 *supra*] before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. . . .

As we stated at the outset of this opinion, the issue decided four years ago in *Goger*, and reconsidered today, is whether section 633(b) requires, or merely permits, a plaintiff to resort to available state age discrimination remedies before instituting federal suit. The resolution of that issue depends upon the interpretation of two statutory provisions: section 626(d), *quoted in part in* n.6 *supra*, and section 633, *quoted in part in* text above.

When *Goger* was decided, the majority of the *Goger* panel, relying primarily on the near-identity of language of section 633(b) and a comparable provision found in Title VII of the Civil Rights Act of 1964[13] reasoned that:

[12] *See* n. 6 *supra*.

[13] 42 U.S.C. § 2000e-5(c), *amending* 42 U.S.C. § 2000e-5(b), reads as follows:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or

(Footnote continued on following page)

> The minor differences between section 633 and its counterpart under the 1964 Act [Title VII] are insignificant and provide no support for an interpretation of the former which is contrary to the Supreme Court's construction in Love v. Pullman, [404 U. S. 522 (1972) (requiring resort to state remedies)]. . . . We therefore conclude that section 633(b) *required* appellant to seek relief from the appropriate [state] agency prior to instituting her suit in the federal district court.

492 F. 2d at 16 (emphasis added).[14]

Relying on a different statutory analysis, the concurrence concluded that section 633(b) afforded litigants an initial choice of forum. 492 F. 2d at 17-18.

The proper interpretation of Section 633(b), requiring as it does the harmonization of admittedly mixed statutory signals, has understandably given rise to a multitude of cases[15] and, inevitably, to differences in result. Those courts which followed our *Goger* decision have in large part adopted the majority's analysis and, by analogizing section 633(b) to the purportedly comparable provision in Title

(Footnote continued from preceding page)

> to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated. . . .

The Supreme Court has construed this provision in Title VII to require a prior resort to state remedies. Love v. Pullman Co., 404 U. S. 522 (1972).

[14] *Accord*, Bonham v. Dresser Indus., Inc., 569 F. 2d 187 (3d Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3695 (U.S. May 1, 1978) (No. 77-1562); Rogers v. Exxon Research & Engineering Co., 550 F. 2d 834 (3d Cir. 1977), *cert. denied*, 98 S. Ct. 749 (1978).

[15] There have been at least forty-three reported judicial decisions which interpret the language of section 633(b). Explanatory Notes to the 1978 Amendments, 46 U.S.L.W. at 56.

VII (42 U.S.C. § 2000e-5(c)), have required resort to state age discrimination remedies before federal suit may be instituted.[16]

Other courts[17] and jurists,[18] the administrative agency charged with enforcement of the ADEA,[19] a joint congressional committee,[20] and certain commentators[21] have cited the *Goger* concurrence and have agreed with the analysis in that opinion that section 633(b) of the ADEA affords the plaintiff an initial choice of forum.

Recognizing the conflict that existed among the various statutory interpretations[22] and faced with increased in-

[16] *E.g.*, Evans v. Oscar Mayer & Co., No. 77-1692 (8th Cir. Apr. 5, 1978); Reich v. Dow Badishe Co., No. 76-7637, slip op. at 6657-70 (2d Cir. Apr. 4, 1978); Curry v. Continental Airlines, 513 F. 2d 691, 693 (9th Cir. 1975); *cf.* Hadfield v. Mitre Corp., 562 F. 2d 84 (1st Cir. 1977) (assuming the applicability of the state resort requirement but refusing to confront the issue directly).

[17] *E.g.*, Gabriele v. Chrysler Corp., 573 F. 2d 949 (6th Cir. 1978); Simpson v. Whirlpool Corp., 573 F. 2d 957 (6th Cir. 1978) (mem.) (following *Gabriele*); Vazquez v. Eastern Air Lines, Inc., 405 F. Supp. 1353 (D.P.R. 1975); *cf.* Bertrand v. Orkin Exterminating Co., Inc., 419 F. Supp. 1123 (N.D. Ill. 1976), *reaffirmed*, 432 F. Supp. 952 (N.D. Ill. 1977).

[18] Reich v. Dow Badiche Co., No. 76-7637, slip op. at 6678 (2d Cir. Apr. 4, 1978) (Feinberg, J., dissenting); Evans v. Oscar Mayer & Co., No. 77-1692, slip op. at 7 (8th Cir. Apr. 5, 1978) (Henley, J., dissenting).

[19] In this case, as in many others, the Secretary of Labor filed an *amicus curiae* brief. The Secretary has consistently argued that the ADEA affords the claimant a choice of forum.

[20] *See* pp. 13-15 *infra*.

[21] *E.g.*, Note, *Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act*, 44 U. Chi. L. Rev. 457, 475-80 (1977) (hereinafter Note, *Procedural Prerequisites*). *See also* Note, *The Age Discrimination in Employment Act of 1967*, 90 Harv. L. Rev. 380, 411 (1976) ("While the language of the ADEA may be identical to that of Title VII in most respects, the problems of age, race and sex discrimination are not. As a result, in resolving these questions under the ADEA, courts could do well to avoid automatic application of Title VII precedents and to look instead more carefully to the distinctive aspects of age discrimination.").

[22] In Bertrand v. Orkin Exterminating Co., Inc., 419 F. Supp. 1123 (N.D. Ill. 1976), *reaffirmed*, 432 F. Supp. 952 (N.D. Ill.

(Footnote continued on following page)

stances of claimants who had not resorted to state remedies, or had done so in an untimely fashion, and further aware of the policy considerations which inclined toward the complainant's choice of forum,[23] we deemed it appropriate to once more examine the issue decided in *Goger*, and insofar as this circuit is concerned, to resolve it definitively by *in banc* decision. In arriving at our determination to reexamine, and ultimately to overrule, *Goger*, we were aided by the Supreme Court's discussion in *Lorillard* v. *Pons*, 46 U.S.L.W. 4150 (U.S. Feb. 22, 1978), and by the recent statutory amendments to the ADEA which, although not controlling, buttress our conclusion that resort need not be had to state administrative machinery prior to filing a federal action.

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1977), Judge Decker summarized some of the conflicting views concerning the proper construction of § 633(b).

> At one extreme may be found a case such as *Vaughn* v. *Chrysler Corporation*, 382 F. Supp. 143 (E.D. Mich. 1974), which analogizes § 633(b) to the jurisdictional deference provisions of Title VII, 42 U.S.C. § 2000e-5(c), thereby constituting a bar to plaintiff's cause of action. Somewhat less harsh is the conclusion of the majority in *Goger* v. *H. K. Porter Co., Inc.*, 492 F. 2d 13 (3d Cir. 1974), that while § 633(b) is a jurisdictional requirement, it nonetheless will not compel dismissal of an action where a plaintiff can present an equitable claim justifying the hearing of his cause. *Curry* v. *Continental Airlines*, 513 F. 2d 691 (9th Cir. 1975), also utilized the analogy of Title VII law to find jurisdictional import in § 633(b), but it strictly construed the words of that section to require a specific legislative mandate to the state authority concerning age-discrimination.
>
> At the other extreme is the more recent opinion in *Vazquez* v. *Eastern Airlines, Inc.*, 405 F. Supp. 1353 (D.P.R. 1975), which concluded that § 633(b) did not establish resort to state law as a jurisdictional prerequisite for a federal age discrimination action. This opinion closely relies on the concurring opinion of Judge Garth in *Goger, supra*. . . .

Id. at 1125.

[23] *See* pp. 16-17 *infra*.

While the narrow holding of *Lorillard* (that claimants under the ADEA are entitled to a jury trial)[24] is not relevant to our present determination, we find highly relevant the discussion in *Lorillard* which concerns the proper interpretation of the entire ADEA. There a unanimous Court[25] ruled that "but for" specific exceptions contained in the ADEA, Congress "intended to incorporate fully [into the ADEA] the remedies and procedures of the [Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*]". 46 U.S.L.W. at 4151. The Court explicitly *rejected* the relevance of Title VII procedures to lawsuits which allege age discrimination. In this connection, albeit in the context of entitlement to a jury trial, the Supreme Court stated:

> [T]he rights created by the ADEA are to be "enforced in accordance with the powers, remedies and procedures" of specified sections of the FLSA. 29 U.S.C. § 626(b).
>
> . . .
>
> Petitioner strives to find a contrary congressional intent by comparing the ADEA with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which petitioner maintains does not provide for jury trials. We, of course, intimate no view as to whether a jury trial is available under Title VII as a matter of either statutory or constitutional right. [Citation.]

[24] *Accord*, Rogers v. Exxon Research & Engineering Co., 550 F. 2d 834, 838-40 (3d Cir. 1977), *cert. denied*, 98 S. Ct. 749 (1978). Congress recently codified the Supreme Court's holding in *Lorillard* that a jury trial is required under the ADEA, *see* Pub. L. No. 95-256, § 4(a), 92 Stat. 190 (1978) (codified at 29 U.S.C.A. § 626(c)(2) (Supp. 1 June, 1978)) (reproduced at 46 U.S.L.W. 51 (May 9, 1978)), thereby signifying congressional approval of that decision.

[25] Justice Blackmun did not participate in the decision.

> However, after examining the provisions of Title VII, we find petitioner's argument by analogy to Title VII unavailing. There are important similarities between the two statutes, to be sure, both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII. But in deciding whether a statutory right to jury trial exists, *it is the remedial and procedural provisions of the two laws that are crucial and there we find significant differences.*
>
> . . .
>
> [*R*]*ather than adopting the procedures of Title VII for ADEA actions, Congress rejected that course in favor of incorporating the FLSA procedures* even while adopting Title VII's substantive prohibitions. Thus, *even if petitioner is correct that Congress did not intend there to be jury trials under Title VII, that fact sheds no light on congressional intent under the ADEA. Petitioner's reliance on Title VII, therefore, is misplaced.*

46 U.S.L.W. at 4151-52 (footnotes omitted) (emphasis added).

As we have previously noted, the majority opinion in *Goger* reached its conclusion through an almost exclusive reliance on an analogy between procedures prescribed under Title VII and those applicable under the ADEA. We now know however that such reliance was unwarranted. Rather, procedures are to be imported from the FLSA, a statute which does not require any, let alone prior, resort to state proceedings in order to redress FLSA violations. 29 U.S.C. §§ 216, 217. The critical premise supporting the majority opinion's reasoning in *Goger* having been undercut by the

Supreme Court's interpretation of the ADEA,[26] the *Goger* conclusion that prior state resort is necessary must also fall.[27]

In sum, *Lorillard* compels us to disavow the *Goger* majority's reliance on an analogy to Title VII procedure—a reliance which it now appears was "misplaced." 46 U.S.L.W. at 4152. We therefore start our inquiry afresh, by examining the language and history of the ADEA in light of comparable provisions found in the FLSA.[28]

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[26] *Accord,* Reich v. Dow Badiche Co., No. 76-7637, slip op. at 6670, 6675 (2d Cir. Apr. 4, 1978) (concurring opinion), where Judge Danaher stated:

> We fairly may disregard Title VII cases respecting the point here at issue under ADEA [whether §§ 626(a) and 633(b) require state resort] in view of the Court's opinion in *Lorillard* v. *Pons,* ____ U. S. ____, ____, 46 U.S.L.W. 4150, 4152 (U.S. February 22, 1978), where the Court perceived that Congress specifically had refused to adopt the procedures of Title VII for ADEA actions. Definitely, the Court made clear, the Congress in ADEA private actions had incorporated fully the remedies and the procedures of the Federal Labor Standards Act.

Cf. Carter v. Marshall, 46 U.S.L.W. 2595 (D.D.C. Apr. 20, 1978) (relying in part on reasoning contained in *Lorillard,* district court held that federal employees have right to jury trial under Equal Pay Act).

[27] *But cf.* Reich v. Dow Badiche Co., No. 76-7637, slip op. at 6670 (2d Cir. Apr. 4, 1978) (Danaher, J., concurring) (concluding that ADEA requires prior state resort but disavowing analogy to Title VII procedures).

While the *Goger* holding could possibly be sustained on some ground other than a Title VII—ADEA comparison and analysis, we have have found no such ground to be persuasive. *See* Reich v. Dow Badiche Co., No. 76-7637, slip op. at 6678 (Feinberg, J., dissenting); text p. 16 *infra.*

[28] As Justice Powell so recently stated, a court must decide "'not to reject [wisdom] merely because it comes too late.'" Monell v. Department of Social Services, 46 U.S.L.W. 4569, 4582 (U.S. June 6, 1978) (concurring opinion) (brackets in original), *quoting* Henslee v. Union Planters Bank, 335 U. S. 595, 600 (1949) (Frankfurter, J., dissenting).

III

The language of the ADEA itself strongly supports our conclusion that no initial resort to state age discrimination remedies is required. The statute nowhere explicitly imposes a resort to state proceedings as a precondition to instituting federal suit. The provision most likely to have dealt with this subject—the jurisdictional provision—does not even suggest, let alone require, prior utilization of available state machinery. 29 U.S.C. §§ 626(c), (d), *as amended,* 29 U.S.C.A. §§ 626 (c), (d) (Supp. 1 June, 1978). Similarly, the FLSA does not require nor intimate that prior resort to state administrative machinery is necessary to enforce its provisions. *Id.* §§ 216, 217. Indeed, the FLSA prescribes precisely the opposite procedure: a complainant is afforded a choice of forum to enforce the provisions of the statute. *Id.* § 216(b).

Nor can the ADEA be construed as even impliedly requiring resort to state remedies. Here 29 U.S.C. § 633 is relevant. The sole basis for suggesting a state resort requirement, *i.e.,* that the language of 633(b) apparently tracks the state exhaustion provision found in Title VII, has been destroyed by *Lorillard.*[29] By contrast, three argu-

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[29] *Lorillard* aside, the relevance of the Title VII exhaustion requirement to enforcement procedures under the ADEA was suspect from the outset.

> Most courts that have read § 2000e-5(c) as requiring such prior resort have done so because Title VII's legislative history is very clear on that point. *Dubois* v. *Packard Bell Corp.,* 470 F. 2d 973, 975 (10th Cir. 1972); *Crosslin* v. *Mountain States Telephone & Telegraph Co.,* 422 F. 2d 1028, 1030-31 (9th Cir. 1970), *vacated and remanded,* 400 U. S. 1004 (1971); *EEOC* v. *Union Bank,* 408 F. 2d 867, 869-70 (9th Cir. 1968); *Stebbins* v. *Nationwide Mutual Insurance Co.,* 382 F. 2d 267, 268 (4th Cir. 1967), *cert. den.,* 390 U. S. 910 (1968); *Ethridge* v. *Rhodes,* 268 F. Supp. 83, 89 (S.D. Ohio 1967). There is no similar legislative history accompanying § 633(b), so the rationale behind the prevailing interpretation of § 2000e-5(c) simply does not apply to § 633(b). . . .

Gabriele v. Chrysler Corp., 573 F. 2d 949, 953 (6th Cir. 1978).

ments derived from the statute itself, as well as other persuasive arguments, support the conclusion that we reach today.

First, the ADEA contains in addition to 633(b) the highly relevant subsection 633(a).[30] That provision provides that a federal action filed over sixty days after commencement of the state action *must supersede* the pending state proceeding.[31] It would indeed be incongruous to attribute an intent to Congress to mandate resort to state proceedings when those proceedings need not be concluded, and would in any event be necessarily superseded by the filing of a federal suit. In short, "the ADEA reflects less deference to state mechanisms than does Title VII." *Reich* v. *Dow Badishe Co.*, No. 76-7637, slip op. at 6684 (2d Cir. Apr. 4, 1978) (Feinberg, J., dissenting); *accord, Gabriele* v. *Chrysler Corp.*, 573 F. 2d 949, 954 (6th Cir. 1978).

Second, even if Title VII procedures were relevant to the interpretation of the ADEA, which *Lorillard* holds they are not, the particular language of the ADEA relevant here (section 633(b)) is not the same as that found in Title VII. As Judge Celebrezze has explained:

> [An] important distinction exists between § 633(b) and § 2000e-5(c). The latter states that "no charge may be filed" until after the sixty-day waiting period. This prevents all federal action during the waiting period, since filing of a charge with the EEOC is a prerequisite to a Title VII suit in federal court. The

[30]Title VII contains no such provision. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1212 (1971).

[31]29 U.S.C. § 633(a) reads in full:

> Federal action superseding State action
>
> (a) Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

> sixty-day period gives the appropriate state agency two months of exclusive jurisdiction over the discrimination allegation. Section 633(b), on the other hand, says "no suit may be brought" until after the sixty-day waiting period. This only prohibits the filing of a complaint in the district court and contemplates possible concurrent administrative action by the state agency and the Department of Labor. *Bonham* v. *Dresser Industries, Inc.*, 569 F. 2d 187, 194, n. 8 (3d Cir. 1977) [*petition for cert. filed*, 46 U.S.L.W. 3695 (U.S. May 1, 1978) (No. 77-1562)]. The absence of a period of exclusive state jurisdiction under the ADEA is thus another indicia of lesser deference to the states under the ADEA than under Title VII. Again, this militates in favor of not requiring prior resort to a state agency before an ADEA suit in federal court.

Gabriele v. *Chrysler Corp.*, 573 F. 2d at 954.[32]

Third, section 633 is entitled "Federal-State Relationship," not "Jurisdiction," nor "Procedural Prerequisites." These latter subjects are dealt with in an entirely different section of the statute, *see* n. 6 *supra*, thereby indicating that congressional concern as expressed in section 633 was restricted to notions of comity and federalism, not to jurisdictional prerequisites.

Additionally, we find it significant that the Secretary has urged that the ADEA affords complainants a choice of forum. "[S]uch a reasonable construction of an ambiguous statute by the agency charged with its administration is entitled to great deference." *Reich* v. *Dow Badiche Co.*, No. 76-7637, slip op. at 6683-84 (Feinberg, J., dissenting), *citing Udall* v. *Tallman*, 380 U. S. 1, 16 (1965); *accord, Goger*, 492 F. 2d at 18 (concurring opinion). *See also Vermont Yankee Nuclear Power Corp.* v. *National Re-*

[32]*Accord*, Note, *Procedural Prerequisites*, 44 U. Chi. L. Rev. at 478-79.

sources Defense Council, Inc., 46 U.S.L.W. 4301, 4308 (U.S. Apr. 3, 1978).

Indeed, Congress itself has recently expressed its views as they bear upon the issue before us.[33] The 1978 Congress, amending other provisions of the ADEA, left the entire section 633 intact, and did not effect any relevant changes in § 626.[34] Nevertheless the joint conference report which accompanied the amendments adopted the Senate Report which dealt with the very issue with which we are here concerned. The relevant section of the Senate Report adopted in the joint conference report reads as follows:

> Section 14(b) of the Act [29 U.S.C. § 633(b)] provides that where an act of discrimination occurs in a State which has an age discrimination law and an agency empowered to grant or seek relief from such discriminatory practices, no suit may be brought under section 7 of this Act [29 U.S.C. § 626] before the expiration of sixty days after proceedings have been commenced under State law, unless such proceedings have been earlier terminated. This provision requires that if the individual chooses to apply first to the State agency for relief he must give the State the prescribed minimum period in which to take remedial action before he may turn to the federal courts for relief under the ADEA. *The provision does not require that the individual go to the State first in every instance.*
>
> *Several courts have properly recognized this distinction.* See e.g., *Smith* v. *Jos. Schlitz Brewing Company*, 419 F. Supp. 770, 774 (D.N.J. 1976) [appeal

[33]Our examination of the legislative history which underlies the 1967 enactment of § 633(b) reveals no support for the proposition that initial resort to state remedies is required. The absence of clear legislative history in this connection has also been recognized by the Sixth Circuit in Gabriele v. Chrysler Corp., 573 F. 2d at 953.

[34]*See* n. 6 *supra*.

> *pending*, No. 77-1745 (3d Cir., filed Mar. 28, 1977)]; *Vazquez* v. *Eastern Air Lines*, 405 F. Supp. 1353, 1356 (D.P.R. 1975); *Bertrand* v. *Orkin Exterminating Company*, 419 F. Supp. 1123, 1126 (N.D. Ill. 1976) [*reaffirmed*, 432 F. Supp. 952 (N.D. Ill. 1977)]; *Goger* v. *H. K. Porter Company*, 492 F. [2d] 13, 17-18 (C.A. 3, 1974) (Garth, J., concurring).
>
> Other courts, however, have ruled that the complainant must go initially to the State authorities in every instance, and that the failure to do so requires dismissal of the federal action. *See Vaughn* v. *Chrysler Corp.*, [382] F. Supp. 143 (E.D. Michigan 1974); *Smith* v. *Crest Communities, Inc.*, 8 FEP Cases 1328 (W.D. Ky. 1974); *Fitzgerald* v. *New England Tel. & Tel. Co.*, 416 F. Supp. 617 (D. Mass. 1976) [*vacated mem.*, 437 F. Supp. 635 (D. Mass. 1977)]; *see also Goger* v. *H. K. Porter Co.*, 492 F. 2d 13 (C.A. 3, 1974).
>
> *It is the committee's view that an individual who has been discriminated against because of age is free to proceed either under state law or under federal law. The choice is up to the individual.* However, as Section 14(b) makes clear, if the individual does choose to proceed initially under State law, he must give the State agency at least 60 days to take remedial action before he may commence a federal action.

S. Rep. No. 493, 95th Cong., 1st Sess. 6-7 (emphasis added), *reprinted in* [1978] U. S. Code Cong. & Ad. News 976, 981-82, *adopted in* "Joint Explanatory Statement of the Committee of Conference," H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 7, 12, *reprinted in* [1978] U. S. Code Cong. & Ad. News 1000, 1006.

It is a rare and welcome event to discover legislative history so unambiguous. Slightly more problematic however is the impact of a 1978 joint committee report on our interpretation of a 1967 enactment. Certainly the intent of

the 1978 amenders of the ADEA cannot be said to represent or reflect the intent of the 1967 Congress: there is no necessary relation back.[35] Yet an interpretation of the ADEA which was feasible, if not preferable, before 1978 has now been officially ratified by the joint congressional committee assigned to study and recommend changes in the statute. We recognize, as did the Supreme Court, that although the views of a subsequent Congress "provide no controlling basis" for inferring original congressional intent, "[n]onetheless, it is pertinent to note [the views of a subsequent congressional committee] . . . reporting . . . on certain proposed amendments to the Act." *Haynes* v. *United States*, 390 U. S. 85, 87-88 n.4 (1968). In *Haynes* the Supreme Court was referring to the House Ways and Means Committee which reported on amendments to the National Firearms Act. *A fortiori* the views of a joint congressional committee are entitled to consideration and weight in our re-examination of the contours of sections 626(d) and 633(b) of the ADEA.

Finally, it is appropriate to consider whether a state resort requirement read into 29 U.S.C. § 633(b) would effectuate or frustrate the purposes of the ADEA. In this regard, we are cognizant of those arguments advanced by the proponents of prior state resort. We appreciate for example the fact that by allowing state agencies to process age discrimination complaints in the first instance, relief may be given to congested federal court calendars. We also acknowledge that a sixty-day wait to which claimants would

[35]Haynes v. United States, 390 U. S. 85, 87 n. 4 (1968) ("[t]he views of a subsequent Congress of course provide no controlling basis from which to infer the purpose of an earlier Congress"); United States v. Price, 361 U. S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"); *see* United States v. Southwestern Cable Co., 392 U. S. 157, 170 (1968); Rainwater v. United States, 356 U. S. 590, 593 (1958).

be subjected under section 633(b) is rather minimal in light the expected length of the overall proceedings.

Even recognizing these arguments as well as the other advantages which may be attributed to a prior resort procedure, we are nevertheless mindful that the ADEA is remedial legislation and is entitled to be liberally construed. *Gabriele* v. *Chrysler Corp.*, 573 F. 2d at 954; *Skoglund* v. *Singer Co.*, 403 F. Supp. 797, 801 (D. N.H. 1975); *see Goger* v. *H. K. Porter Co., Inc.*, 492 F. 2d at 17. As such in the absence of congressional expression, we should be chary about creating unnecessary procedural bars which may, at the outset, require the dismissal of otherwise meritorious age discrimination claims. Moreover, it seems anomalous to us that deference must be accorded to state agency procedures when it is a *federal* right that is sought to be vindicated. Indeed, it should not be overlooked that whatever might be said in favor of requiring the initiation of procedures before a state agency, section 633(a) by its terms has always permitted total disruption of state proceedings (once sixty days have passed) by requiring that a federal suit supersede any state action.

On balance therefore we do not hesitate to conclude that the ADEA's purposes would be frustrated rather than fulfilled if we were to perpetuate a procedural requirement which in many instances would prevent an otherwise meritorious age discrimination claim from being considered.[36]

[36]In this circuit alone, we have had three examples of claimants who had not fulfilled what we characterized in Rogers v. Exxon Research & Engineering Co., 530 F. 2d 834, 844 (3d Cir. 1977), *cert. denied*, 98 S. Ct. 749 (1978), as the "jurisdictional" requirement of resorting to prior state proceedings. In each instance however we recognized an equitable "outlet" which avoided the harsh result of dismissing the complaint because of this procedural bar. Bonham v. Dresser Indus., Inc., 569 F. 2d 187 (3d Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3695 (U.S. May 1, 1978) (No. 77-1562); Rogers v. Exxon Research & Engineering Co., 530 F. 2d at 844; Goger v. H. K. Porter Co., Inc., 492 F. 2d 13 (3d Cir.

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IV

While it may be unusual for us to reject a court precedent announced by us but four years ago, when it becomes apparent that jurisprudential integrity demands no less, we will not shrink from undertaking that assignment. To expand upon the observation expressed by Judge Gibbons in *Cox* v. *Dravo Corp.*,[37] "[w]e should not countenance the continued application in this circuit of a rule, even of our own devising, which is patently inconsistent with the Supreme Court's pronouncements," and which does not take into account valid public policy concerns, congressional predilection, and our own unease with a judicial impediment to remedial legislation. These considerations result in our now construing section 633(b) differently from the construction to which we subscribed four years ago in *Goger*. Accordingly, we now hold, contrary to our holding in *Goger*, that no prior resort to state agency procedures is required as a precondition to commencing a federal action charging age discrimination under the ADEA.[38]

The order of the district court will be reversed, and the case remanded for proceedings not inconsistent with this opinion.

To THE CLERK:

Please file the foregoing opinion

(s) (Not legible)
Circuit Judge

(Footnote continued from preceding page)

1974). Our overturning of *Goger's* state resort doctrine will now permit a more straightforward approach to fulfilling the remedial purposes of the ADEA—without our having to fashion equitable "savings" devices.

[37] 517 F. 2d 620, 627 (3d Cir.), *cert. denied*, 423 U. S. 1020 (1975).

[38] Our holding today also decides the question left unanswered by our court in Marshall v. West Essex General Hosp., No. 77-1758 (3d Cir. Apr. 20, 1978): *a fortiori* the Secretary of Labor need not resort to state age discrimination remedies before prosecuting charges under the ADEA.

JAMES P. HOLLIDAY, *Appellant*, v. KETCHUM, MACLEOD & GROVE, INC., a corporation; EDWARD T. PARRACK; WILLIAM H. GENGE; CHARLES E. MCHUGH; and JAMES E. FULLER No. 77-1867

HUNTER, *Circuit Judge:*

We again are presented with the question whether section 14(b) of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 633(b), requires that a state administrative agency be given 60 days to attempt to remedy, usually by obtaining voluntary compliance, age discrimination in employment prior to an individual's resort to a federal court. The statute, as the court's opinion notes, does not by its plain text answer this question. In *Goger* v. *H. K. Porter Co.*, 429 F. 2d 13 (3d Cir. 1974), a majority of a panel of this court held that such prior resort was required. The majority looked to the legislative history of the ADEA and found only a repetition of the statutory language and no guidance. 429 F. 2d at 16. The language of section 14(b) was found to be substantially identical to the "state deference" requirement in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(c). That section at that time, as now, requires resort to state procedures before a federal remedy is invoked. *E.g. Love* v. *Pullman Co.*, 404 U. S. 522 (1972). *See Occidental Life Insurance Co.* v. *EEOC*, 432 U. S. 355, 357 (1977). While the majority recognized differences between Title VII and the ADEA procedures, it felt that the differences did not warrant departure, in the absence of congressional direction, from the analogy to Title VII plainly suggested by the similar language of the two statutes. *See Northcross* v. *Board of Education*, 412 U. S. 427 (1973), (per curiam); *United Shoe Workers of America* v. *Bedell*, 506 F. 2d 174 (D.C. Cir. 1974). Three courts of appeals have followed the reasoning of the majority opinion in *Goger*. *Evans* v. *Oscar Mayer & Co.*, No. 77-1692 (8th Cir. Apr. 5, 1978); *Reich* v.

Dow Badische Co., No. 76-7637 (2d Cir. April 4, 1978); *Curry* v. *Continental Airlines*, 513 F. 2d 691, 693 (9th Cir. 1975). *But see, e.g., Gabriele* v. *Chrysler Corp.*, 573 F. 2d 949 (6th Cir. 1978).

The court has now looked again at the intent of Congress to interpret section 14(b), in light of the 1978 amendments to the Act. Although Congress did not amend the language of section 14(b) which relates to the issue before us, the Reports of the Senate and Conference Committees contained *en passant* references to the Committees' view of the role of state procedures in the Act's remedial scheme. While recognizing that this after-the-fact "legislative history" is pertinent, although not entitled to great weight, *see, e.g., Haynes* v. *United States*, 390 U. S. 85, 87-88 n. 4 (1968), the court has now concluded that Congress in 1967 intended that the victim of age discrimination is not required first to seek a state remedy.[1] Prior resort to the state is to be left to the option of the employee.

The question of state deference in this context is purely a matter for the legislature. In the light of all the legislative material now before us, and in view of our experience with litigation under the Act, *see, e.g., Bonham* v. *Dresser Industries, Inc.*, 569 F. 2d 187 (3d Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3695 (U.S. May 1, 1978); *Rogers* v. *Exxon Research & Engineering Co.*, 550 F. 2d 834 (3d Cir. 1977), *cert. denied*, 98 S. Ct. 749 (1978), the court's present decision is, in my view, appropriate.

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[1]The Court's opinion also relies on the recent Supreme Court decision in Lorillard v. Pons, 46 U.S.L.W. 4150 (U.S. Feb. 22, 1978), as undercutting the reasoning in *Goger*. While I agree that the Supreme Court pointed out the weakness of the analogy between Title VII and the ADEA in some contexts, I do not believe that *Lorillard* compels a wholesale rejection of such reasoning. For example, this court recently found such an analogy quite helpful in Rodriguez v. Taylor, 569 F. 2d 1231 (3d Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3617 (U.S. Mar. 23, 1978). *Lorillard* stands only for the narrow point that the provisions of the two statutes which affect the right to a jury trial are sufficiently different that they should not be construed *pari passu* on that particular question.